Supreme Court, U.S.
FILED

No. _____

09-712 DEC 14 2009

In The OFFICE OF THE CLERK

Supreme Court of the United States

INGRID FELDERHOF,

Petitioner,

v.

JENKENS & GILCHRIST, P.C., et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

STEVEN J. KNIGHT

CHAMBERLAIN, HRDLICKA, WHITE, WILLIAMS & MARTIN
1200 Smith Street, Suite 1400
Houston, Texas 77002
Telephone: (713) 658-1818
Facsimile: (713) 658-2553

Counsel for Petitioner Ingrid Felderhof

COCKLE LAW BRIEF PRINTING CO (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Does the Fifth Circuit's Rule 60(b)(1) "excusable neglect" analysis conflict with *Pioneer Investment Services Company v. Brunswick Associates Limited Partnership*, 507 U.S. 380, 113 S.Ct. 1489 (1993), which requires a district court to consider multiple and specific factors?

LIST OF PARTIES

1. Ingrid Felderhof, Petitioner
2. Jenkens & Gilchrist, P.C., Respondent
3. John Felderhof, Respondent
4. Groia & Company, Respondent

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
LIST OF PARTIES	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	v
OPINIONS BELOW	1
STATEMENT OF JURISDICTION	1
STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED	1
STATEMENT	2
Factual Background	2
Proceedings Below	6
ARGUMENT	8
REASONS FOR GRANTING THE PETITION	8
CONCLUSION	21

APPENDIX

Opinion of the United States Court of Appeals Dated August 12, 2009	App. 1
Order of the United States District Court for the Southern District of Texas Dated October 1, 2008	App. 3
Opinion of the United States Court of Appeals Dated August 26, 2008	App. 11

TABLE OF CONTENTS – Continued

Page

Final Judgment of the United States District Court for Southern District of Texas Dated January 10, 2007 ..... App. 32

Order of the United States Court of Appeals Denying Petition for Rehearing Dated September 14, 2009 ..... App. 35

TABLE OF AUTHORITIES

Page

CASES

Feeney v. AT&E, Inc., 472 F.3d 560 (8th Cir. 2006) 10, 11

In re Dierschke, 975 F.2d 181 (5th Cir. 1992) ... 11, 12, 13

Jenkens & Gilchrist v. Groia & Company, 542 F.3d 114 (5th Cir. 2008) (*"Jenkins I"*) ..... *passim*

Jenkens & Gilchrist v. Groia & Company, Cause No. 08-20642 (5th Cir. Aug. 12, 2009) (*"Jenkins II"*) ..... *passim*

Lemoge v. United States, __ F.3d __, 2009 WL 4546727 (9th Cir. Dec. 7, 2009) 9, 11

Pioneer Investment Services Company v. Brunswick Associates Limited Partnership, 507 U.S. 380, 113 S.Ct. 1489 (1993) ..... *passim*

Union Pacific Railroad Company v. Progress Rail Services Corporation, 256 F.3d 781 (8th Cir. 2001) 10, 11

STATUTES

28 U.S.C. § 1254(1) 1

RULES

Bankruptcy Rule 9006(b)(1) 8, 9

Federal Rule of Civil Procedure 60(b)(1) ..... *passim*

OPINIONS BELOW

Jenkens & Gilchrist v. Groia & Company, 542 F.3d 114 (5th Cir. 2008) (*"Jenkens I"*); and

Jenkens & Gilchrist v. Groia & Company, Cause No. 08-20642 (5th Cir. Aug. 12, 2009) (*"Jenkens II"*).

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit was entered on August 12, 2009. Petitioner filed a Motion for Rehearing, which was denied on September 14, 2009. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

Federal Rule of Civil Procedure 60(b)(1):

> (b) Grounds for Relief from a Final Judgment, Order, or Proceeding. On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons:
>
> (1) mistake, inadvertence, surprise, or excusable neglect.

STATEMENT

Factual Background

John Felderhof, a former officer of Bre-X, retained Jenkens & Gilchrist, P.C. ("Jenkens") to represent him in certain legal matters. To *secure* payment of its fees, Jenkens instructed Ingrid Felderhof, his former wife, to transfer to Jenkens her stock in Travis Close, Inc. (which would give Jenkens possession of her residence located in Williamsburg, Virginia). Jenkens promised Ms. Felderhof that it would return the residence to her so long as Jenkens' fees were fully paid. For approximately ten years, Jenkens maintained the residence as security for its fees.

On September 8, 2006, after Ms. Felderhof paid all of Jenkens' fees (more than $2.2 million), Ms. Felderhof asked Jenkens to return the residence as promised. Jenkens refused. On September 20, 2006, Ms. Felderhof again wrote to Jenkens, demanding it to return the residence. Jenkens again refused. Jenkens explained its position in a letter dated October 26, 2006, but not faxed to Ms. Felderhof until November 9, 2006. Jenkens represented that it " . . . *is not claiming any interest in the house* . . . " and that it was "in the difficult and untenable position of having conflicting and competing claims regarding the property."[1] Jenkens stated that if no agreement

---

[1] According to Jenkens, Ms. Felderhof's ex-husband and his Canadian Counsel (Groia & Company) also asserted a claim to the residence.

was reached *by December 4, 2006*, it would file an interpleader action.

On November 14, 2006, Ms. Felderhof responded to Jenkens' November 9, 2006 letter. The same day, Jenkens filed an interpleader lawsuit in the United States District Court for the Southern District of Texas. Jenkens pled that it "is at risk of being subject to double or multiple liability, conflicting claims and judgments from various courts regarding the ownership of Travis Close Inc. and its sole asset, the Residence."

On November 16, 2006, Ms. Felderhof was handed legal papers while in the Cayman Islands, where she resides. The same day, she brought them to the office of her Cayman attorney, who was, at that time, out of the country. When her attorney returned on November 28, 2006, he reviewed the documents delivered in his absence. The documents consisted of a fifty-three page complaint and exhibits, but did not include a summons or a deadline for answering.

Within days of her attorney's return to the Island, Ms. Felderhof received papers indicating that a pre-trial scheduling conference had been scheduled for February 14, 2007. Ms. Felderhof diligently notified her attorney of the notice. Aware of no other summons or command to appear in court, Ms. Felderhof and her attorney believed the notice of the pre-trial scheduling conference provided Ms. Felderhof with her opportunity to respond to the lawsuit. Ms. Felderhof swore in her uncontroverted affidavit she

planned to appear for the scheduling conference. No evidence to the contrary exists.

Importantly, the Cayman Island Postal Service does not make deliveries to physical addresses. Rather, all mail to Island residents must be addressed to a specific post office box number and must include the correct postal office code. According to the Cayman Island Postal Service, all misaddressed mail is promptly returned to the sender. Before Jenkens sued Ms. Felderhof, Jenkens addressed its mailings to Felderhof's P.O. Box using the correct post office code. However, after Ms. Felderhof demanded the return of her residence, Jenkens began addressing motions and court notices to an invalid mailing address, assuring non-delivery.

The summons Jenkens claims was served on Ms. Felderhof on November 16, 2006 stated that an answer must be filed in thirty days, *i.e.*, by December 16, 2006. On Friday, December 15, 2006, before an answer was even due, Jenkens filed a "request for entry of default." Jenkens' Certificate of Service does not include a P.O. Box or post office code. Ms. Felderhof never received Jenkens' filing.

On Monday, December 18, 2006, the district court signed an order setting Jenkens' request for entry of default for hearing on January 5, 2007. The trial court judge instructed Jenkens' counsel on that date to issue a notice of the January 5 hearing to Ms. Felderhof. Jenkens waited until December 27, 2006 to send its notice, and, once again, failed to include a

P.O. Box or post office code. Ms. Felderhof never received Jenkens' request for entry of default or its notice of the January 5, 2007 hearing.

On January 5, 2007, over one month before the pre-trial scheduling conference was to occur, the district court asked Jenkens' counsel whether it placed Ms. Felderhof on notice of the January 5 hearing. Jenkens' counsel stated that it provided notice in the best manner it could. Of course, no proof of delivery was presented. The district court then granted Jenkens' request for entry of default. Three days later, Jenkens filed a motion for summary judgment, and, contrary to its earlier representation that it was not claiming an interest in the residence, sought a declaration that it is its sole owner. The Certificate of Service on Jenkens' motion does not include a P.O. Box or post office code. The district court granted Jenkens' motion the day after it was filed.

Ms. Felderhof first received notice of the default judgment (by a Canadian journalist) on or about January 11, 2007. This was the first notice Ms. Felderhof or her Cayman attorney received that would show proceedings were underway in the lawsuit. She immediately obtained local Texas counsel and undertook substantial efforts to vacate the default taken against her by her former attorneys.

Proceedings Below

Ms. Felderhof filed a motion for relief from the default under Rule 60(b)(1). Under the Fifth Circuit's current "excusable neglect" test, Ms. Felderhof established that she has meritorious defenses to all of Jenkens' claims; that Jenkens would not be prejudiced by setting aside the default judgment; and that she did not act willfully. Ms. Felderhof also established that other considerations weighed in her favor, including her prompt motion, the amount in dispute and the fact that the proceedings involving real property resulted in a forfeiture of her residence.

On April 2, 2007, the district court denied Ms. Felderhof's motion without conducting an evidentiary hearing or offering any explanation or analysis. Ms. Felderhof appealed. In *Jenkens I*, the Fifth Circuit held that Ms. Felderhof has meritorious defenses; Jenkens would not be prejudiced by setting aside the default; and other factors weighed in favor of setting aside the default. (App. 23-26). The Fifth Circuit held: "[W]e must also assume that neither she nor her attorney ever saw the summons, and that they were legitimately confused as to their responsive duties under the circumstances;" "[b]ecause there are no countervailing equities (*i.e.*, because Jenkens has not presented a legitimate claim of prejudice that would arise from setting aside the default), 'any doubt should, as a general proposition, be resolved in favor of [Ms. Felderhof] to the end of securing a trial upon the merits.'" (App. 29-30). The Fifth Circuit remanded the case. (App. 31).

On October 1, 2008, on remand, the district court again denied relief, only this time it entered a seven-page order explaining its findings. (App. 3-10). The district court declined to consider any factor other than whether Ms. Felderhof acted "willfully." (App. 7). The district court found that the default was willful based on its determination that (1) Ms. Felderhof refused to communicate with Jenkens beginning in mid-October 2006 (*e.g.*, she refused a Federal Express package; she instructed her attorneys to destroy communications regarding the litigation and not to provide forwarding information to Jenkens); (2) Ms. Felderhof was actually aware of the summons but chose to act as though she were not served with a summons; (3) Ms. Felderhof disregarded court notices and Jenkens' filings (the only specific example cited in the order was the notice to appear at the January 5th hearing on the motion for entry of default); and (4) the court "doubts" Ms. Felderhof "seriously planned" to appear at the February pre-trial scheduling conference in light of the absence of evidence concerning such things as travel arrangements and the lack of filing a certificate of interested parties. (App. 7-10). Ms. Felderhof appealed.

In *Jenkens II*, Ms. Felderhof established that each of the district court's factual findings conflict with the record and also conflict with the Fifth Circuit's opinion in *Jenkens I*. The Fifth Circuit, however, affirmed without saying why. (App. 1-2).

ARGUMENT

REASONS FOR GRANTING THE PETITION

In *Jenkens II*, the Fifth Circuit affirmed the district court's order which fails to apply or even mention the controlling excusable neglect factors this Court adopted in *Pioneer Investment Services Company v. Brunswick Associates Limited Partnership*, 507 U.S. 380, 113 S.Ct. 1489 (1993). Relying on pre-*Pioneer* case law, the Fifth Circuit deems the *Pioneer* factors inapplicable, causing a conflict with other Circuits which have followed *Pioneer*. This Court should accept Certiorari and create uniformity among the Circuits with respect to the excusable neglect factors that must be considered in the context of a Rule 60(b)(1) analysis.

A. The Fifth Circuit's Rule 60(b)(1) analysis conflicts with this Court's determination that "excusable neglect" requires consideration of multiple factors and elements.

In *Pioneer Investment Services Company v. Brunswick Associates Limited Partnership*, 507 U.S. 380, 113 S.Ct. 1489 (1993), the Supreme Court analyzed the factors that must be considered by a lower court in the context of a motion filed under Bankruptcy Rule 9006(b)(1) – a rule which permits equitable relief from a creditor's failure to file a timely

proof of claim based on an excusable neglect standard. The Court noted, initially, that Rule 9006(b)(1) has certain commonalities with Rule 60(b)(1) of the Federal Rules of Civil Procedure. *Id.* at 393. Among other things, both statues permit relief from judgments or orders based on a showing of "excusable neglect," yet neither rule defines the phrase. The Supreme Court held:

> Because Congress has provided no other guideposts for determining what sorts of neglect will be considered "excusable," we conclude that the determination is at bottom an *equitable one*, taking account of *all relevant circumstances* surrounding the party's omission. These include, as the Court of Appeals found, [1] the danger of prejudice to the debtor, [2] the length of delay and its potential impact on judicial proceedings, [3] the reason for the delay, including whether it was within the reasonable control of the movant, and [4] whether the movant acted in good faith.

Id. at 394 (bracketed items added) (emphasis added).

Following *Pioneer*, Circuits have recognized that these factors apply equally to motions filed under Rule 60(b)(1) seeking relief from judgments. Most recently, in *Lemoge v. United States*, __ F.3d __, 2009 WL 4546727 (9th Cir. Dec. 7, 2009), for example, the Ninth Circuit held that it is an abuse of discretion for the district court to not apply *all* of the *Pioneer* factors when analyzing excusable neglect under Rule 60(b)(1). *Id.* at *2.

Similarly, in *Feeney v. AT&E, Inc.*, 472 F.3d 560 (8th Cir. 2006), the Court held that "[t]he determination of excusable neglect 'is at bottom an equitable one, taking account of *all* relevant circumstances surrounding the party's omission." *Id.* at 564 (emphasis added). The Court held that the "relevant circumstances" are the four factors this Court adopted in *Pioneer*. *See id.*

In *Union Pacific Railroad Company v. Progress Rail Services Corporation*, 256 F.3d 781 (8th Cir. 2001), the Court held:

> In deciding whether to set aside a default judgment for "excusable neglect," a district court ought not focus narrowly on the negligent act that caused the default and ask whether the act was itself in some sense excusable. Instead, the court should take account of "all relevant circumstances surrounding the party's omission," *Pioneer Investment*, 507 U.S. at 395, 113 S.Ct. 1489. The inquiry is essentially an equitable one, and *the district court is required to engage in a careful balancing of multiple considerations*, including "the danger of prejudice to the [non-moving party], the length of the delay and its potential impact on judicial proceedings, the reason for the delay, including whether it was within the reasonable control of the movant, and whether the movant acted in good faith." We have applied these principles regularly since the Supreme Court laid them out in *Pioneer Investment*. We have also concluded that "the existence of

> a meritorious defense continues to be a relevant factor," in deciding these kinds of cases after Pioneer Investment.

Id. at 782-83 (internal citations omitted). The Court concluded that the district court's failure to weigh all of the *Pioneer* factors was an abuse of discretion.

Cases such as *Lemoge*, *Feeney*, and *Progress Rail Services Corporation* represent a correct application of *Pioneer*, which emphasized that "excusable neglect" is an equitable concept that is grounded in many considerations that go well beyond whether the district court believes the defaulting party acted with or without good faith. Consistent with *Pioneer*, these Circuits require *each* factor to be carefully weighed.

The Fifth Circuit has not adopted the *Pioneer* factors, and, under its test, a district court is ***not*** required to consider any combination of factors. Generally, the Fifth Circuit examines "whether the default was willful, whether setting it aside would prejudice the adversary, and whether a meritorious defense is presented." *In re Dierschke*, 975 F.2d 181, 183 (5th Cir. 1992). The Fifth Circuit has also stated that a district court may consider whether the public interest was implicated, whether there was significant financial loss to the defendant, and whether the defendant acted expeditiously to correct the default. *See id.* at 183-84. However, as the Fifth Circuit stated in *Jenkens I*, "[t]he district court need not consider all of the above factors in ruling on a defendant's 60(b)(1)

motion; the imperative is that they be regarded simply as a means of identifying circumstances which warrant the finding of 'good cause.'" *Id.* at 119 (citing *Dierschke* at 184). Moreover, under the Fifth Circuit's test, the "court has the discretion to refuse to set aside a default judgment under 60(b)(1) if the defendant" (1) "fails to present a meritorious defense sufficient to support a finding on the merits for the defaulting party," or (2) "if a district court finds a defendant's default to be willful." *Id.* at 120 (citing *Dierschke*, 975 F.2d at 184). In the case of the latter, "the district court need not make any other finding." *Id.*

The Fifth Circuit's Rule 60(b)(1) "excusable neglect" analysis conflicts with *Pioneer*. The Fifth Circuit's analysis is problematic because the equitable factors from *Pioneer* that this Court held define "excusable neglect" are completely overlooked; a district court is not required to focus on any particular factor; and, if a district court believes a defaulting party acted without good faith (one of several elements from *Pioneer*), a default stands notwithstanding the possibility that every other *Pioneer* factor weighs in favor of permitting the party to answer the lawsuit.

That scenario is presently before this Court.

In *Jenkens I*, the Fifth Circuit established the law of this case that (1) Ms. Felderhof had meritorious defenses to Jenkens' claims; (2) Jenkens would not be prejudiced by setting aside the default;

(3) Ms. Felderhof acted promptly to set aside the default; and (4) the amount in controversy – a Williamsburg residence, real property valued at over $1 million – weighed in favor of granting relief. The Fifth Circuit was unable to determine whether the evidence showed willfulness or not; though it noted: "While there is evidence suggestive of willfulness on the party of Ms. Felderhof, resolving doubt in Ms. Felderhof's favor, we do not believe the record conclusively shows that her default was willful." (App. 29). The Fifth Circuit remanded the case and gave the district court the option of making written findings, which the district court neglected to do prior to the first appeal.

On remand, the district court commenced its analysis by framing the issue narrowly. Citing *In re Dierschke*, a Fifth Circuit case decided one year before *Pioneer*, the district court held that if it "determines defendant was willful in not responding to the claims against her, no other finding is required." (App. 7). The district court determined Felderhof's default was "willful," and failed to consider or mention any other factor, including the factors the Fifth Circuit had previously determined in *Jenkens I* weighed in favor of setting aside the default. In *Jenkens II*, the Fifth Circuit affirmed, without giving a reasoned opinion.

Not only is the district court's willfulness finding erroneous (as discussed in the next section), the district court was required to consider the danger of prejudice to Jenkens; the length of delay and its

potential impact on judicial proceedings; the reason for the delay, including whether it was within the reasonable control of the movant; and whether the movant acted in good faith. The district court's failure to consider the applicable factors was a clear abuse of discretion. The district court and the Fifth Circuit's "excusable neglect" analysis is completely at odds with the *Pioneer* factors and the Circuits which have adopted it. Accordingly, this Court should grant Certiorari.

B. *Jenkens II* must be reversed because the district court's impermissibly-narrow analysis is a clear abuse of discretion.

In denying Ms. Felderhof's motion for a second time, the district court held she defaulted willfully based on the court's finding that (1) Ms. Felderhof refused to communicate with Jenkens beginning in mid-October 2006 (*e.g.*, she refused a Federal Express package; she instructed her attorneys to destroy communications regarding the litigation and not to provide forwarding information to Jenkens); (2) Ms. Felderhof was actually aware of the summons but chose to act as though she were not served with a summons; (3) Ms. Felderhof disregarded court notices and Jenkens' filings (the only specific example cited in the order was the notice to appear at the January 5th hearing on the motion for entry of default); and (4) the court "doubts" Ms. Felderhof "seriously planned" to appear at the February pre-trial scheduling conference in light of the absence of evidence

concerning such things as travel arrangements and the lack of filing a certificate of interested parties. (App. 7-10). Each and every factual finding contained within the district court's order is factually and legally erroneous.

Finding: Ms. Felderhof refused to communicate with Jenkens beginning in mid-October 2006.

However, Ms. Felderhof made further written demands for her residence on November 14. Also, Ms. Felderhof was not served until November 16, and no lawsuit existed in October. Even if she failed to communicate in mid or late October, which did not happen, such failure cannot demonstrate a willful failure to appear because the lawsuit did not exist and there was no duty to appear. *Jenkens I*, 542 F.3d at 123, n.6 ("the duty to answer only arises after service has been perfected.").

Finding: Ms. Felderhof "refused" a Federal Express package.

There is no evidence that a Fed-Ex package was ever presented to Ms. Felderhof. Jenkens' Fed-Ex envelope was misaddressed. There is no evidence Ms. Felderhof was at the residence at the time of any alleged attempted delivery. The letter in the package was received by Ms. Felderhof via facsimile on October 26 anyway, plainly demonstrating she was not avoiding communications from Jenkens. Also, Ms. Felderhof was not served until November

16; any purported lack of communication in mid or late October cannot demonstrate a willful failure to appear. *Jenkens I*, 542 F.3d at 123, n.6 ("the duty to answer only arises after service has been perfected.").

Finding: Ms. Felderhof instructed her attorneys to destroy communications *regarding the litigation* and not to provide *her* forwarding information to Jenkens.

The district court's finding is based on an e-mail Jenkens included in the record wherein an attorney at a firm Felderhof used before Jenkens filed suit returned a facsimile to Jenkens, advising it that Ms. Felderhof would not accept communications from her ex-husband, John Felderhof.[2] John Felderhof had been sending embarrassing and abusive faxes to Felderhof at her home

---

[2] On November 3, 2006, prior to Jenkens' lawsuit, an attorney at a firm Felderhof had previously used notified Jenkens:

> I am writing further to your facsimile of this morning to James Chapman. James Chapman left Ogier earlier this year and *we no longer act for Ms. Felderhof.* We have been instructed by Ms. Felderhof that *we are not to accept any communication from Mr. Felderhof or anyone on his behalf* and that *we are not to forward* any *such communication*. Accordingly, we are returning your facsimile to you by mail without reading the same. We have further been instructed that if we receive any further *such communication*, we are not to acknowledge it and we are simply to destroy it. We would be grateful if you would inform *Mr. Felderhof* of the above forthwith.

and at her attorneys' office. Understandably, Ms. Felderhof did not want to have to pay attorney time for her counsel to review inappropriate faxes received from her ex-husband. The instructions were given well before any dispute with Jenkens over the residence arose and before any "litigation" existed. Further, Ms. Felderhof maintained communication with Jenkens, which, at all times, knew where Ms. Felderhof was located and how to contact her. Ms. Felderhof did not move, change phone numbers or her fax number – there was no new forwarding information to provide. Additionally, pre-suit, pre-service conduct cannot evidence a willful failure to answer the lawsuit.

Finding: Ms. Felderhof was *actually aware* of the summons but chose to act as though she were not served with a summons.

The only testimony in the record on this point shows she was unaware of the summons. Also, in *Jenkens I*, the court held that the Court "must also assume that neither she nor her attorney ever saw the summons, and that they were legitimately confused as to their responsive duties under the circumstances." *Id.* at 123-24. This is the law of the case, which the district court failed to apply.

Finding: Ms. Felderhof disregarded court notices and Jenkens' filings (the only specific example cited in the order was the notice to appear at the January 5th hearing on the motion for entry of default).

The only evidence on this point is sworn statements that she never received any such notice. Jenkens did not send the notice of hearing until December 27, and it sent the notices to an invalid mailing address. Jenkens assured Ms. Felderhof would not receive its motion for default; notice of hearing; or its motion for summary judgment.

Finding: The court "doubts" Ms. Felderhof "seriously planned" to appear at the February pretrial scheduling conference in light of the absence of evidence concerning such things as travel arrangements and the lack of filing a certificate of interested parties.

The district court was obligated to resolve doubt in Ms. Felderhof's favor, not against her. In *Jenkens I*, the court held " . . . 'any doubt should . . . be resolved in favor of [Ms. Felderhof] to the end of securing a trial upon the merits.'" No authority supports an inference of willfulness based on the lack of filing a certificate of interested parties, particularly when other parties failed to file one as well.

On appeal, Jenkens failed to address the district court's findings in support of willfulness. During

argument, the Panel noted, during its questioning of Jenkens' counsel, that Jenkens did not address in its brief each of the principal erroneous factual findings by the District Court. (*See* Oral Argument at 25:58). In short, Jenkens cannot defend the indefensible. So, it remained silent.

Rather than reverse the district court's order based on clear error, the Fifth Circuit deviated from the applicable abuse of discretion review standard, which must focus on the district court's actual factual findings. Rather than focus its inquiry on the *Pioneer* factors, or even ask whether the factual findings are clearly erroneous, the Court asked whether it could affirm the judgment as a whole despite that it rests upon an unsound factual foundation. During argument, the panel asked whether the order could be affirmed *despite* the erroneous findings:

> "Well, I guess we don't review findings; well we do review findings, but we also review judgments. And even if you are focusing on four findings, you say all of them are clear error. . . . *But even if that's the case, you still have the fact that we found that she could not say she did not receive the summons.*"

(Oral Argument at 11:08) (emphasis added).

Under *Pioneer*, receipt of a summons or complaint alone does not satisfy the excusable neglect elements. Further, in *Jenkens I*, the Fifth Circuit acknowledged that actual service of a summons was not determinative even under the Fifth Circuit's "excusable

neglect" analysis *Id.* at 123. ("In sum, perfection of service is not determinative – *the defendant's knowledge of the perfected service*, and the defendant's actions *post-service* also play a role in measuring the willfulness of the defendant's default.") (emphasis added). With respect to Felderhof's knowledge of perfected service, the *Jenkens I* court held: "*we also must assume* that neither she nor her attorney ever saw the summons, and that they were *legitimately confused* as to their responsive duties under the circumstances." *Id.* at 124 (emphasis added). *Jenkens I* is the law of the case. If Ms. Felderhof and her Cayman Counsel never saw the summons, were unaware of it, and were legitimately confused about their responsive duties under the circumstances, how can receipt of the summons and complaint ever form the basis of an intentional failure to respond?

Ms. Felderhof has steadily, consistently, and undyingly pursued the return of her residence. She did not, and would not, willfully default so as to permit her counsel to deprive her of her real property in Virginia. All of the district court's findings are in error, and the Fifth Circuit's order in *Jenkens II* cannot be reconciled with its findings in *Jenkens I* or this Court's opinion in *Pioneer*.

CONCLUSION

For all of these reasons, Ingrid Felderhof requests this Court to grant her Petition for Writ of Certiorari and reverse the judgment of the Court of Appeals and the District Court. Ms. Felderhof deserves an opportunity to appear in the lawsuit and fight for the return of her residence.

Respectfully submitted,

STEVEN J. KNIGHT

CHAMBERLAIN, HRDLICKA, WHITE, WILLIAMS & MARTIN
1200 Smith Street, Suite 1400
Houston, Texas 77002
Telephone: (713) 658-1818
Facsimile: (713) 658-2553

Counsel for Petitioner Ingrid Felderhof

REVISED August 26, 2009

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 08-20642

JENKENS & GILCHRIST A PROFESSIONAL CORPORATION

Plaintiff-Appellee

v.

GROIA & COMPANY, A Professional Corporation

Defendant-Appellee

v.

INGRID FELDERHOF

Defendant-Appellant

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 4:06-cv-03590

(Filed Aug. 12, 2009)

Before JONES, Chief Judge, and PRADO and HAYNES, Circuit Judges.

PER CURIAM:*

AFFIRMED. *See* 5TH CIR. R. 47.6.

---

* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

JENKENS & GILCHRIST, A PROFESSIONAL CORPORATION, Plaintiff, v. GROIA & COMPANY, A PROFESSIONAL CORPORATION, JOHN FELDERHOF, and INGRID FELDERHOF, Defendants.	§ § § § § § § § § § § § §	Civil Action No. H-06-3590

ORDER

Pending before the Court is Defendant Ingrid Felderhof's Motion to Vacate Order on Entry of Default and Set Aside Final Judgment (Document No. 23) on remand from the United States Court of Appeals for the Fifth Circuit. The Fifth Circuit directed the Court to issue a more detailed ruling explaining this Court's denial of Felderhof's motion pursuant to Rule 60(b)(1) of the Federal Rules of Civil Procedure.

BACKGROUND

This dispute stems from legal services Jenkens & Gilchrist, a Professional Corporation, ("Jenkens") provided to John and Ingrid Felderhof (collectively

"the Felderhofs") between 1997 and 2006. During that time, Canadian and U.S. authorities were investigating the Felderhofs for their roles in Bre-X Minerals, Ltd., a mining corporation. To secure itself against the potential that government authorities might freeze or seize the Felderhofs' assets, Jenkens entered into a representation agreement with the Felderhofs. This agreement provided for a $1,000,000 retainer to be paid in cash or valuable assets. At the same time, the Felderhofs transferred to Jenkens all shares in Travis Close, Inc., a corporation solely held by the Felderhofs. The only asset owned by Travis Close, Inc. was a home in Williamsburg, Virginia. That home is the subject of dispute in this case.

Jenkens completed its legal representation of the Felderhofs in 2006. At that time, Defendant Ingrid Felderhof ("Felderhof") informed Jenkens she wished that Jenkens transfer the Virginia home back to her. Jenkens informed Felderhof that because there were competing claims to the home, Jenkens would be forced to file an interpleader action to determine the rightful owner of the property.

On November 14, 2006, Jenkens filed in this Court an interpleader action seeking a declaratory judgment determining the rightful owner of the Virginia home. Despite being personally served on November, 16, 2006, Felderhof never filed an answer

nor responded in any way to those pleadings.[1] Felderhof was then served with a copy of the Court's Order for Conference and Disclosure of Interested Parties (Document No. 2), which directed her to appear for a pre-trial conference and to file, within fifteen days, a certificate of persons or entities with a financial interest in the litigation.[2] Felderhof never filed the certificate.[3]

On December 15, 2006, Jenkens filed a request for entry of default against Felderhof. A hearing on the entry of default was scheduled for January 5, 2007. Felderhof was served with notice of the request and the hearing to be held on the entry of default. Felderhof never responded to the motion, nor did she appear at the hearing.

On January 5, 2007, the Court granted Jenkens's motion for entry of default. Subsequently, Jenkens, along with Defendants Groia, and John Felderhof, filed a joint motion for summary judgment asking the court to declare Jenkens the lawful owner of the Virginia home. On January 10, 2007, the Court granted the joint motion and entered final judgment declaring

---

[1] Despite Felderhof's contention otherwise, the Fifth Circuit made clear the "record precludes Ms. Felderhof from establishing she was not served with a summons."

[2] Felderhof admits receiving the Court's Order for Conference and Disclosure of Interested Parties.

[3] The Court granted Jenken's Request for Entry of Default (Document No. 11) prior to the date of the pre-trial scheduling conference.

Jenkens the sole owner of Travis Close, Inc. and its only asset – the Williamsburg, Virginia home at issue here.

On February 22, 2007, Felderhof filed this motion to set aside the entry of default and vacate the final judgment pursuant to FED. R. CIV. P. 60(b)(1) and FED. R. CIV. P. 60 (b)(4). The Court denied Felderhof's motion. At the direction of the Fifth Circuit, the Court now sets out, in detail, an explanation of its denial of Felderhof's motion to vacate order on entry of default and set aside the final judgment under FED. R. CIV. P. 60(b)(1).

STANDARD OF REVIEW

The decision to grant or deny a motion to set aside an entry of default is within the sound discretion of the trial court. *In re Dierschke,* 975 F.2d 181, 183 (5th Cir. 1992). In determining whether to set aside a default, the Court is to consider: (1) whether the default was willful; (2) whether setting it aside would prejudice the adversary; and (3) whether a meritorious defense is presented. *Id.* at 183. The Court may also consider other factors, including whether the public interest is implicated, whether there was a significant financial loss to the defendant, and whether the defendant acted expeditiously to correct the default. *Id* at 184. Generally, no single factor is controlling; a balancing should be employed to determine if good cause exists to set aside the default. *Id.* However, if the district court determines defendant

was willful in not responding to the claims against her, no other finding is required. *Id.* at 184-85 (noting that *willful* failure to respond "may constitute sufficient cause for the court to deny" relief from default). A finding that a party willfully failed to respond is a factual determination. *Id.* at 184 ("The factual determination – that the failure to answer was intentional – is reviewed under the clearly erroneous standard."). A defendant's default may not be willful if the defendant merely mistakenly assumes that she was not served with process. *See Lacy v. Sitel Corp.*, 227 F.3d 290, 292-93 (5th Cir. 2000). However, default may be willful if the defendant "chose to make a decision that he hadn't been served when, in fact, he had," and "chose to play games with the court." *Dierschke*, 975 F.2d at 184.

LAW & ANALYSIS

Though Felderhof communicated with Jenkens prior to the date the complaint was filed, beginning in mid-October 2006, she refused to communicate in any way with Jenkens. *Compare Lacy*, 227 F.3d at 292-93 (finding defendant's default not willful where defendant maintained communications with plaintiff regarding the litigation). Specifically, for instance, Felderhof refused to accept a Federal Express package containing a letter regarding the Virginia property sent by Jenkens on October 26, 2006. More egregiously, Felderhof instructed her attorneys not to accept any communications regarding the litigation – rather, she instructed her attorneys not to

acknowledge receipt of, and to "simply destroy," any such communication. *See* Jenkens & Gilchrist's Response to Defendant Ingrid Felderhof's Motion to Vacate Order on Entry of Default and Set Aside Final Judgment (Document 29), Exhibit 4. Nor were the attorneys allowed to provide Jenkens with forwarding information for Felderhof. This refusal to communicate with Jenkens extended beyond the date the lawsuit was filed and the time Felderhof was properly served.[4]

Moreover, this willfulness included Felderhof's defiance toward orders of this Court. For example, Felderhof willfully ignored the Court's repeated instructions and attempts at contact, willfully ignored opposing counsel's attempts to contact her relative to the proceedings, and willfully failed to respond to the claims against her in this case. It was not until the Court entered a final judgment did Felderhof grasp the serious consequences of the "games" she played. *See Dierschke,* 975 F.2d at 183 ("[T]he plain and simple fact is that Mr. Dierschke chose to play games with this court."). Even then, more than thirty days passed before Felderhof filed her motion to set aside the entry of default and final judgment.

---

[4] Despite the fact that Felderhof was properly, personally served with process and summons, she made a deliberate choice to act as though she had not been properly served with summons in an apparent attempt to avoid litigation.

Furthermore, the Court finds Felderhof's recent assertion that she "planned to attend" the pre-trial scheduling conference nothing more than an *ex post facto* attempt to excuse her deliberate disregard for the Court's earlier instructions.[5] Felderhof offers no evidence of this plan other than her own bare assertion – she presents no evidence that she had arranged travel accommodations, retained local counsel, or made any other preparations to attend such a hearing.

In sum, Felderhof did not merely neglect to file a response to the initial pleadings. Her subsequent actions make clear to the Court that Felderhof's failure to respond was due not to any excusable neglect, but was rather due to her calculated intent to eschew the Court's authority, ignore the realities of litigation, and frustrate the judicial process relative to this matter. *See id.* Felderhof treated this litigation, and her responsibilities as a party to it, with blatant disregard. Because the Court finds that Felderhof acted willfully in refusing to properly participate in the litigation, the Court declines to grant her the

---

[5] The Court notes that the order in which Felderhof received notice of the pre-trial scheduling conference also contained an order directing Felderhof to submit to the Court a certificate of persons or entities with financial interest in the litigation. Felderhof failed to submit the certificate. The Court doubts that a party who seriously "planned to attend" the pre-trial scheduling conference would fail to submit the certificate as instructed by the Court.

relief she seeks from the consequences of her own conduct. *See id.* Accordingly, the Court hereby

ORDERS that Defendant Ingrid Felderhof's Motion to Vacate Order on Entry of Default and Set Aside Final Judgment (Document No. 23) is DENIED.

SIGNED at Houston, Texas, on this the 1 day of October, 2008.

/s/ David Hittner
DAVID HITTNER
United States District Judge

542 F.3d 114

United States Court of Appeals,
Fifth Circuit.

JENKENS & GILCHRIST, A Professional Corporation, Plaintiff-Appellee,
v.
GROIA & COMPANY, A Professional Corporation, Defendant-Appellee,
v.
Ingrid Felderhof, Defendant-Appellant.

No. 07-20296.

Aug. 26, 2008.

Daniel V. Flatten (argued), Nancy Hahn Elliott, Porter Hedges, Houston, TX, for Plaintiff-Appellee.

Steven J. Knight (argued), Chamberlain, Hrdlicka, White, Williams & Martin, Houston, TX, for Ingrid Felderhof.

Thomas Mente Benjamin (argued), Alan H. Goodman, Lemle & Kelleher, New Orleans, LA, for Groia & Co.

Appeal from the United States District Court for the Southern District of Texas.

Before JONES, Chief Judge, and DAVIS and GARZA, Circuit Judges.

EMILIO M. GARZA, Circuit Judge:

Ingrid Felderhof appeals the district court's denial of her motion, filed pursuant to FED.R.CIV.P. 60(b), to vacate the default judgment entered against

her. For the following reasons, we affirm in part, vacate in part, and remand.

I

During 1997, John Felderhof and his wife, Ingrid Felderhof, were under investigation by the Canadian government and the United States' Securities and Exchange Commission regarding the development of gold mining prospects by Bre-X Minerals, Ltd. Mr. Felderhof was a director and senior executive with Bre-X. In response to the investigations, the Felderhofs obtained legal representation from Jenkens and Gilchrist ("Jenkens"). Worried that the Felderhofs' assets may be frozen or seized as a result of the investigations, Jenkens entered into the Modified Legal Representation Agreement (the "Agreement") with the Felderhofs. Aside from payment for hourly fees, the Agreement provided that Jenkens was to be paid a non-refundable $1-million-dollar retainer. This retainer was to be paid in cash or valuable assets. Around the same time that she entered into the Modified Agreement, Ms. Felderhof transferred to Jenkens all of the shares of Travis Close, Inc. The sole asset of Travis Close was a home in Williamsburg, Virginia.[1]

In 2006, after Jenkens completed its work for the Felderhofs, Ms. Felderhof sent a letter to her counsel

---

[1] Ms. Felderhof also transferred to Jenkens a Lamborghini automobile that was subsequently sold by Jenkens.

at Jenkens suggesting that they arrange to transfer the Williamsburg home back to her. Her letter claimed that Jenkens only agreed to hold the home as "caretaker," and that once all fees were paid that the home would be returned to her. Counsel from Jenkens responded, explaining that Jenkens was not merely "caretaker" of the home, and that because there were competing claims to the home, Jenkens could be forced to commence an interpleader action.

Jenkens subsequently filed an interpleader complaint in the Southern District of Texas to finally resolve ownership of Travis Close, Inc. and the Williamsburg home. The complaint named Groia & Company (a Canadian law firm that had represented the Felderhofs and claimed an interest in proceeds from the sale of the residence), John Felderhof, and Ingrid Felderhof as defendants. Groia and John Felderhof filed answers admitting most of the factual allegations in Jenkens' interpleader complaint. Ms. Felderhof did not file an answer. The facts surrounding Ms. Felderhof 's failure to file an answer are as follows.

On November 16, 2006 in the Cayman Islands, Ms. Felderhof was personally served with a packet of papers including Jenkens' complaint. The parties dispute whether these papers included a summons as required under FED. R. CIV. P. 4. Upon receiving these papers, Ms. Felderhof took them to the offices of her lawyer, John Chapman, in Grand Cayman. Chapman was out of the country and did not return until

November 28. Upon return, he reviewed the papers brought to his office by Ms. Felderhof.

Subsequently, Ms. Felderhof was served with a copy of the district court's Order for Conference and Disclosure of Interested Parties. The order required counsel to appear for a pre-trial conference and file a certificate of persons or entities with a financial interest in the litigation within fifteen days. Ms. Felderhof never filed the requisite certificate.

Because Ms. Felderhof never filed an answer, Jenkens filed a motion for entry of default as to Ms. Felderhof which was granted by the district court. Jenkens, Groia, and John Felderhof then filed a joint motion for summary judgment seeking to have the court declare, *inter alia,* that Jenkens is the sole and lawful owner of the stock of Travis Close, Inc. and its sole asset, the Williamsburg home. The district court granted the joint motion and entered final judgment declaring Jenkens the sole owner.

After learning of the default judgment against her, Ms. Felderhof filed a motion in the district court to have the default judgment set aside pursuant to FED. R. CIV. P. 60(b)(1) and FED. R. CIV. P. 60(b)(4). Rule 60(b)(1) provides that a party may be relieved from a final judgment for "mistake, inadvertence, surprise, or excusable neglect." Ms. Felderhof argued that her neglect in failing to answer was excusable under FED. R. CIV. P. 60(b)(1) because she was never served with a summons, or in the alternative because the summons was lost prior to her or her attorney

ever seeing it; and that she never learned of her duty to answer. Rule 60(b)(4) provides that a party may be relieved from a final judgment if it is determined that "the judgment is void." Ms. Felderhof argued that the default judgment was void under FED. R. CIV. P. 60(b)(4) because she was never served with a summons, and thus, the court never had personal jurisdiction over her. After receiving briefing, affidavits, and documentary evidence, the district court summarily denied Ms. Felderhof 's motion.

II

The district court's order provided no factual finding as to whether Ms. Felderhof was served with a summons. Nor did the district court address any of the factors traditionally considered in determining whether relief from a default judgment is proper under Rule 60(b)(1).

We review *de novo* a district court's conclusion as to whether a judgment is void for lack of personal jurisdiction under Rule 60(b)(4). *See Goetz v. Synthesys Technologies, Inc.*, 415 F.3d 481, 483 (5th Cir.2005). We review the district court's denial of relief under Rule 60(b)(1) for abuse of discretion. *See Lacy v. Sitel Corp.*, 227 F.3d 290, 292 (5th Cir.2000). "Because of the seriousness of a default judgment, and although the standard of review is abuse of discretion, even a slight abuse of discretion may justify reversal." *Lacy*, 227 F.3d at 292. We normally review the district court's factual conclusions for clear error.

See Lacy, 227 F.3d at 292 (noting that factual determinations underlying a 60(b)(1) denial are reviewed for clear error); *Goetz,* 415 F.3d at 483 (noting that clear error applies to factual findings related to 60(b)(4) rulings). However, in this circumstance, we analyze the district court's denial of relief under Rule 60(b)(1) and 60(b)(4) in light of the lack of findings provided by the district court.

III

A

We turn first to Ms. Felderhof's argument under Rule 60(b)(4). On appeal, Ms. Felderhof argues that the district court's judgment was void under Rule 60(b)(4) because she was not served with a summons as required under Rule 4. *See* FED. R. CIV. P. 4(c) ("A summons must be served with a copy of the complaint."); *Recreational Props., Inc. v. Southwest Mortgage Serv. Corp.,* 804 F.2d 311, 314 (5th Cir.1986) ("If a court lacks jurisdiction over the parties because of insufficient service of process, the judgment is void and the district court must set it aside.").[2] While the

---

[2] Ms. Felderhof's only contention under Rule 60(b)(4) relates to her failure to receive a summons. Ms. Felderhof raises no argument that personal service of both the complaint and summons would not satisfy the process requirements of Rule 4(f)(1). Rule 4(f)(1) provides that an individual in a foreign country may be served "by any internationally agreed means of service . . . such as those authorized by the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents." FED.R.CIV.P. 4(f)(1).

(Continued on following page)

district court failed to resolve the disputed facts surrounding the service of summons, FED.R.CIV.P. 52(a)(3)[3] indicates that a district court is not required to state findings or conclusions when deciding a Rule 60(b) motion. Moreover, even where findings are specifically required at the conclusion of a bench trial, under FED.R.CIV.P. 52(a)(1), we have recognized that a remand for specific findings is unnecessary "if a complete understanding of the issues may be had without the aid of separate findings." *Armstrong v. Collier,* 536 F.2d 72, 77 (5th Cir.1976). "[A] remand is often deemed unnecessary if all the evidence is documentary and the appellate court can pass upon the facts as well as the trial court, or if all the facts relied upon to support the judgment are in the record and are undisputed, or if the record as a whole presents no genuine issue as to any material fact." *Id.* We have also stated that a remand is not necessary if "the record would not support" a finding in the appellant's

---

Ms. Felderhof also contends that she did not receive "proper notice" of Jenkens application for default judgment pursuant to FED.R.CIV.P. 55(b)(2). However, the notice requirement of Rule 55(b)(2) only applies to parties that have "appeared" prior to the entry of a default judgment. While "we have taken an expansive view as to what constitutes an appearance under Rule 55(b)(2)," Ms. Felderhof made no contact with the court or opposing parties until after the entry of default judgment. *Rogers v. Hartford Life & Acc. Ins. Co.,* 167 F.3d 933, 936 (5th Cir.1999).

[3] "The court is not required to state findings or conclusions when ruling on a motion under Rule 12 or 56 or, unless these rules provide otherwise, on any other motion." FED.R.CIV.P. 52(a)(3).

favor, and if such a finding would be deemed clearly erroneous had it been made. *See Kratzer v. Capital Marine Supply, Inc.*, 645 F.2d 477, 483 (5th Cir.1981). Applying the above rule to determine whether a remand is necessary in this instance, we ask whether the record could support a finding in Ms. Felderhof 's favor as to the service of the summons.

The evidence before the district court concerning service of the summons was as follows. Jenkens submitted a copy of a signed return of service form. Jenkens also submitted two affidavits from the process server. The process server averred that he personally served the complaint and summons on Ms. Felderhof at a Grand Cayman shopping mall on November 16, 2006. Finally, Jenkens submitted a copy of a summons directed to Ms. Felderhof that had been issued by the district court on November 14, 2006 and initialed by the process server. The process server averred that he initialed a copy of the summons upon serving Ms. Felderhof. Ms. Felderhof submitted affidavits from herself and Chapman, her attorney in the Cayman Islands. Ms. Felderhof admitted that she was served with a bundle of what looked like "legal papers" while at a shopping mall on November 16. However, she averred that she did not review the papers served on her. Instead, she took them to Chapman's office on November 16. Chapman was out of the country until November 28. Chapman averred that upon returning to his office he reviewed the papers that had been dropped off by Ms. Felderhof twelve days prior. His affidavit states that, on

November 28, there was no summons amongst the papers he reviewed.

The only evidence that could support Ms. Felderhof's position is the averment by her attorney that, 12 days after service, the summons was not in the pack of papers in his office. The statement of her attorney regarding the content of the pack of papers on November 28 does not rebut the process server's affidavit, and it does not create a material issue of fact as to whether Ms. Felderhof was served with a summons on November 16. The record cannot support a finding in Ms. Felderhof's favor, and had the district court concluded that Ms. Felderhof was not served with the summons, such a finding would have been clearly erroneous. Accordingly, the district court did not err in denying Ms. Felderhof relief from the default judgment under Rule 60(b)(4) based on her claim that she was not served with a summons.

B

We next consider Ms. Felderhof's claim for relief from the default judgment under Rule 60(b)(1). In determining whether good cause exists to set aside a default judgment under Rule 60(b)(1) we examine the following factors: "whether the default was willful, whether setting it aside would prejudice the adversary, and whether a meritorious defense is presented." *In re Dierschke,* 975 F.2d 181, 183 (5th Cir.1992). Courts may also consider whether the public interest was implicated, whether there was significant financial

loss to the defendant, and whether the defendant acted expeditiously to correct the default. *See id.* at 183-84. The district court need not consider all of the above factors in ruling on a defendant's 60(b)(1) motion; "the imperative is that they be regarded simply as a means of identifying circumstances which warrant the finding of 'good cause.'" *Id.* at 184.

However, two of the above factors carry special significance. A district court has the discretion to refuse to set aside a default judgment under 60(b)(1) if the defendant "fails to present a meritorious defense sufficient to support a finding on the merits for the defaulting party." *Lacy,* 227 F.3d at 293. Also, if a district court finds a defendant's default to be willful, then the district court need not make any other finding. *See Dierschke,* 975 F.2d at 184.

The district court reached no finding as to willfulness, prejudice, or the merit of Ms. Felderhof's asserted defenses. Nor did the district court provide any indication as to whether the remaining factors favor granting or denying relief from the default judgment under Rule 60(b)(1). Again applying the above-stated rule that remand is unnecessary where the record would not support a finding in Ms. Felderhof's favor, we examine the above factors to determine whether the district court's 60(b)(1) denial

may be affirmed despite the lack of specific findings by the district court.[4]

We first address whether Ms. Felderhof has presented a meritorious defense. In her motion to set aside the default judgment, Ms. Felderhof's most basic defense on the merits was to deny Jenkens' factual allegations regarding the transfer of the Travis Close stock and the Williamsburg home. Jenkens claimed that the stock and home were part of its $1 million non-refundable retainer under the Modified Agreement. Ms. Felderhof claimed that the parties reached a different agreement which provided that Jenkens held the stock and the home to secure payment of fees, and that Jenkens would return the home to her once Jenkens' fees were paid.

To support its claim to the residence, Jenkens submitted to the district court the Modified

---

[4] Because of the drastic nature of default judgments, the Third Circuit has indicated that a district court errs if it denies a motion to set aside a default judgment under 60(b)(1) without addressing certain necessary factors. *See Emcasco Ins. Co. v. Sambrick,* 834 F.2d 71, 73-74 (3d Cir.1987) (reversing district court where it based its decision on a defendant's delay in answering without addressing prejudice or meritorious defense elements). While we agree that findings are useful for appellate review, they are not required under Rule 52(a), and therefore a lack of findings does not *per se* result in reversal or vacatur. *See Enron Oil Corp. v. Diakuhara,* 10 F.3d 90, 96-97 (2d Cir.1993) (noting that a district court should provide specific reasons but that a lack of explanation for denying relief from default is not fatal "so long as it is possible to discern that the appropriate criteria have been satisfied").

Agreement. The Modified Agreement was signed by the Felderhofs on May 16, 1997 but was intended to "memorialize[ ] the revised agreement [the parties] reached conceptually on May 6." The Modified Agreement does not, by its terms, refer to the stock of Travis Close or the Williamsburg home as being part of the $1 million non-refundable retainer. The Modified Agreement simply states that the retainer can be paid with "cash or other valuable assets." The Agreement states that Jenkens had received "certain assets of uncertain value" but does not identify the stock or the home as part of the "valuable assets" used to satisfy the retainer. Jenkens also provided the affidavit of Andrius Kontrimas, a Jenkens attorney, who served as Ms. Felderhof's counsel. Kontrimas averred that the stock transfer was "part of the consideration for the Modified Agreement" and that Ms. Felderhof agreed to transfer the Residence "free and clear of any liens or encumbrances." An affidavit from Joseph Groia, the Felderhofs' Canadian counsel states that "[a]t the time of entering into the agreement with Heenan Blaikie [the predecessor law firm to Groia & Company], the Felderhofs agreed to assign a non-cash asset for both the benefit of Jenkens and Heenan Blaikie. The non-cash asset was the stock of Travis Close." Jenkens submitted two stock certificates – one dated January 2, 1997 indicating Ms. Felderhof's ownership of the Travis Close stock, and another dated December 30, 1997 indicating Jenkens' ownership of the Travis Close stock. Jenkens also submitted what appears to be a blank stock transfer agreement signed by Ms. Felderhof on May 6, 1997.

The blank agreement does not contain any information other than the date and Ms. Felderhof's signature. Finally, Jenkens argued that its payment of income tax on the home in 1997, and its maintenance of the home over ten years show that Ms. Felderhof intended to transfer full ownership of the Travis Close stock and the Williamsburg home.

To support the factual allegations in her defense, Ms. Felderhof presented her own affidavit, as well as letters exchanged between her and Kontrimas in 2006 regarding the Williamsburg home.[5] Ms. Felderhof's affidavit states that "Andrius assured me that my house in Virginia would be maintained by his firm and returned to me after the firm's engagement was concluded if all outstanding bills to his firm were paid in full. It was Andrius's promises to maintain the house and return it to me if and when I paid all of his firm's legal fees that led me to transfer the house to his firm." Prior to Jenkens' filing its interpleader complaint, Ms. Felderhof wrote two letters to Kontrimas. They reinforce her alleged understanding of the agreement regarding the Travis Close stock and the Williamsburg home. In the letters, Ms. Felderhof

---

[5] Ms. Felderhof also submitted an affidavit from her Cayman counsel, Chapman. However, because Chapman did not represent Ms. Felderhof until 1999, he provides no testimony based on personal knowledge of the 1997 stock transfer. However, his affidavit does state that, "Mrs. Felderhof always told me that her understanding was that the residence would have to be returned to her after the firm's engagement was concluded if all outstanding bills to [Jenkens] were paid in full."

requests that Jenkens arrange to transfer the home back to her. In response to Ms. Felderhof's letters, Kontrimas wrote that "There was never a caretaker arrangement." However, his letter also states that "I did tell you that my Firm and I would do the right thing regarding Travis Close," and that "other than reimbursement of the fees, expenses, and income tax" associated with Jenkens' holding the house for the previous ten years, "my law firm is not claiming any interest in the house or proceeds of sale." His letter continues, "We have attempted to follow what I thought was the right thing to do under the terms of our agreement and current circumstances. Unfortunately, there does not appear to be an agreement with my suggested course of action." Finally, Kontrimas indicates in his letter that if a law suit was commenced, he would "likely . . . be a fact witness in the litigation to testify as to the facts surrounding the legal engagement and continuing representation." Ms. Felderhof argues that Kontrimas' letter supports her contention that there was an agreement regarding transfer of the stock and the home that did not involve the assets becoming part of Jenkens' nonrefundable retainer. Ms. Felderhof also argues that Jenkens' holding the home for ten years without selling it provides circumstantial support for her understanding: that Jenkens only held the home as security until all fees were paid, when it would be returned to her.

The record clearly supports the fact that Ms. Felderhof transferred the stock of Travis Close to

Jenkens. However, with regard to the details of the transfer of the Travis Close stock and the Williamsburg home, the record on appeal essentially reduces to a swearing match by affidavit. Kontrimas and Groia aver that the stock and home were transferred outright to fulfill the retainer obligation set forth in the Modified Agreement, while Felderhof avers that the assets were transferred merely as security to ensure payment of fees. Ms. Felderhof's motion and the evidence submitted to the district court provided definite factual allegations, as opposed to mere legal conclusions, in support of her defense. *See Moldwood Corp. v. Stutts,* 410 F.2d 351, 352 (5th Cir.1969) (stating that a defendant must make a "clear and specific showing . . . by [a] definite recitation of facts" that the defendant has a valid defense). And her "defense is measured not by whether there is a likelihood that it will carry the day, but whether the evidence submitted, if proven at trial, would constitute a complete defense." *Enron Oil Corp. v. Diakuhara,* 10 F.3d 90, 98 (2d Cir.1993); *see* 10A Charles Alan Wright, Arthur R. Miller, & Mary Kay Kane, Federal Practice & Procedure: Civil 3d § 2697 (1998) ("The underlying concern is to determine whether there is some possibility that the outcome of the suit after a full trial will be contrary to the result achieved by the default."). Because Ms. Felderhof provided definite factual allegations with supporting record evidence that, if believed at trial, would lead to a result contrary to that achieved by the default, we cannot assume that the district court rested its denial of Rule 60(b)(1) relief on the lack of a meritorious

defense. *Cf. Gomes v. Williams,* 420 F.2d 1364, 1366 (10th Cir.1970) (noting that "bald allegation, without supporting facts underlying the defense, will not sustain the burden of the defaulting party under Rule 60(b)").

Next, we note that a number of the other factors listed in *Dierschke* arguably cut in favor of Ms. Felderhof. Along with her potentially "meritorious" defense, Ms. Felderhof claims that she stands to suffer a "significant financial loss," because the home is currently listed for sale at approximately $1.3 million. *See Seven Elves, Inc. v. Eskenazi,* 635 F.2d 396, 403 (5th Cir.1981) (recognizing that the large value of a $250,000 claim against the defendant "itself militat[ed] in favor of a full trial on the merits."). Also, Jenkens appears to present ineffectual claims of prejudice; its briefing on appeal merely refers to expected difficulties Jenkens may face if forced to proceed with further litigation. *See Lacy,* 227 F.3d at 293 (5th Cir.2000) (indicating that delay, or requiring a plaintiff to prove his case does not constitute prejudice). Finally, Ms. Felderhof claims that she expeditiously responded once she learned of the default. Though it took her a month to obtain local counsel and file her motion for relief from judgment, she presented affidavit testimony from herself and Chapman indicating that she began her search for local counsel immediately but ran into a number of unexpected difficulties including slow responses from the local counsel she sought, and conflicts of interest that prevented others from representing her

in the matter. The district court did not address any of these factors.

Finally, we reach the issue of willfulness. If Ms. Felderhof's default was willful then the district court's denial of 60(b)(1) relief may be affirmed on that ground alone. *See Dierschke,* 975 F.2d at 184-85. Again, the district court made no finding as to willfulness, so in considering whether a remand is necessary, we must ask whether the record precludes a finding in Ms. Felderhof's favor.

We have already determined that the record precludes Ms. Felderhof from establishing she was not served with a summons. But this fact is not dispositive of Ms. Felderhof's willfulness. We have recognized that even where a defendant mistakenly concludes that he was not served with process, the defendant's default may not be willful. *See Lacy,* 227 F.3d at 292-93 (Where defendant mistakenly assumed it was not served but maintained contact with plaintiff concerning matter of litigation, default was not willful.). On the other hand, we have affirmed a lower court's finding of willfulness where the lower court determined that the defendant simply "chose to play games with the court" and "chose to make a decision that he hadn't been served when, in fact, he had." *Dierschke,* 975 F.2d at 184. In sum, perfection of service is not determinative – the defendant's knowledge of the perfected service, and the defendant's actions post-service also play a role in measuring the willfulness of a defendant's default.

Ms. Felderhof contends that even if there was a summons in the papers served on her, it was inadvertently lost; and thus, neither she nor her counsel ever knew of the duty to answer the complaint. She contends that her claims to ownership of the Williamsburg home, evidenced in her letters to Kontrimas, suggest that she would not allow a default judgment to be entered against her because such a judgment would deprive her of any interest in the home. She also claims that her expeditious forwarding of all legal papers to her attorney shows that she did not intend to avoid litigation or "play games" with the court.

Nonetheless, even were the summons never seen, Ms. Felderhof received other forms of notice of the interpleader action.[6] Chapman saw the complaint in his office twelve days after Ms. Felderhof was served. Ms. Felderhof also admits that she later received an order for a pre-trial scheduling conference. She and Chapman aver that they intended to be at the conference (which never occurred because of the entry of

---

[6] Jenkens contends that Ms. Felderhof willfully evaded service, thus suggesting willfulness in her failure to answer. Even were we to accept Jenkens' claims of willful evasion of service (which Ms. Felderhof disputes), intentionally evading service is "insufficient to make a defendant's failure to answer willful," *Keegel v. Key West & Caribbean Trading Co., Inc.*, 627 F.2d 372, 374 (D.C.Cir.1980), because the duty to answer only arises after service has been perfected. *Cf. Lacy*, 227 F.3d at 292 n. 5 (noting that willful evasion of service is not grounds to support an entry of default).

default), because they assumed that the conference would yield greater detail as to what was required of Ms. Felderhof in light of never seeing the summons nor receiving further instructions for answering the complaint. As the conference never occurred, Ms. Felderhof did not have the opportunity to make good on what she now avers to have been her intent to attend. Still, she contends that her plan to attend supports her claim that she did not seek to avoid litigation of the matter. Finally, despite receiving the complaint and the order for conference, the only recourse actually taken by Ms. Felderhof prior to entry of default was to check the local court registry in Grand Cayman for any pending filings against her.

Because there are no countervailing equities (*i.e.*, because Jenkens has not presented a legitimate claim of prejudice that would arise from setting aside the default), "any doubt should, as a general proposition, be resolved in favor of [Ms. Felderhof] to the end of securing a trial upon the merits." *Gen. Tel. Corp. v. Gen. Tel. Answering Serv.*, 277 F.2d 919, 921 (5th Cir.1960). While there is evidence suggestive of willfulness on the part of Ms. Felderhof, resolving doubts in Ms. Felderhof's favor, we do not believe the record conclusively shows that her default was willful. Shortly prior to the filing of the complaint, Ms. Felderhof engaged in regular correspondence with Jenkens concerning the dispute over the Williamsburg residence. As the record reflects her contemporaneous intent to claim ownership of the Williamsburg residence, it would be quite strange for Ms. Felderhof

to willfully default when doing so would destroy her interest in the home. Moreover, assuming a summons was served, resolving doubt in Ms. Felderhof's favor, we also must assume that neither she nor her attorney ever saw the summons, and that they were legitimately confused as to their responsive duties under the circumstances. Finally, while the initial scheduling conference never occurred, we cannot entirely discount the sworn affidavit testimony from Ms. Felderhof and her attorney that they planned to attend the pre-trial conference under the mistaken assumption that the conference would yield further guidance with respect to the interpleader complaint received from Jenkens. While Ms. Felderhof was not the model of a properly responsive defendant, we cannot say that this sparse record *requires* a court to find her default willful.

As noted above, a number of the factors relevant to a good cause determination under Rule 60(b)(1) appear to cut in Ms. Felderhof's favor – and the record does not indisputably support a denial of Rule 60(b)(1) relief on "willfulness" grounds. While the record does not require a finding of willfulness, neither does the record preclude such a finding. Without guidance from the district court as to the basis for its Rule 60(b)(1) decision, we cannot determine whether the district court abused its discretion; and we are, thus, constrained to vacate this portion of the district court's order. *See Enron Oil,* 10 F.3d at 96-97 (noting that a district court's lack of findings or explanation

in support of its Rule 60(b) denial may "defeat intelligent appellate review").

IV

For the foregoing reasons, we AFFIRM the district court's denial of relief from default judgment under Rule 60(b)(4). We VACATE the district court's denial of relief under Rule 60(b)(1) and REMAND. If, on remand, the district court determines that its denial of Ms. Felderhof's motion under Rule 60(b)(1) is supported by the current record, then the district court need only issue a more detailed ruling sufficient to resolve that which currently hinders our review. Otherwise, the district court is instructed to institute further proceedings consistent with this opinion.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

JENKENS & GILCHRIST, A PROFESSIONAL CORPORATION, Plaintiff, vs. GROIA & COMPANY, A PROFESSIONAL CORPORATION, JOHN FELDERHOF, and INGRID FELDERHOF Defendants.	§ § § § § § § § § § § § § § §	C.A. NO. C.A. NO. H-06-3590

FINAL JUDGMENT

(Filed Jan. 10, 2007)

Be it remembered that on this date there came on to be heard the Joint Motion for Summary Judgment of Plaintiff Jenkens & Gilchrist, a Professional Corporation ("Jenkens & Gilchrist") and Defendants Groia & Company and John Felderhof, and it appearing to the Court that such motion is well taken, the Court accordingly finds, orders and decrees:

1. That Jenkens & Gilchrist is the sole and lawful owner of the stock of Travis Close Inc. and its sole asset, the single family dwelling located at [Home Address Omitted], Williamsburg, Virginia,

legal description Lot 53 Travis Pond Governor's Land ("the Residence").

2. That neither Ingrid Felderhof nor John Felderhof own any interest in Travis Close Inc. and its sole asset, the single family dwelling located at [Home Address Omitted], Williamsburg, Virginia, legal description Lot 53 Travis Pond Governor's Land, the Residence.

3. That Jenkens & Gilchrist and Groia & Company are entitled to one half of the net proceeds from the sale of Travis Close Inc., and its sole asset, the Residence.

4. That Ingrid Felderhof and John Felderhof are enjoined from instituting any action or proceeding in any other court for a determination of the ownership of the stock of Travis Close Inc. and its sole asset, the Residence, and/or for a claim to proceeds for its sale.

5. That Jenkens & Gilchrist, Groia & Company and John Felderhof are released and discharged from any further liability with regard to the Travis Close Inc. and the sale of its sole asset, the Residence.

6. That Jenkens & Gilchrist recover its reasonable and necessary attorneys' fees and taxable costs of Court, and any charges, fees, taxes or other expenses incident to the upkeep, management, and sale of the Residence.

Signed this 9 day of January, 2007.

/s/ David Hittner
United States
District Judge Presiding

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 08-20642

JENKENS & GILCHRIST
A PROFESSIONAL CORPORATION

Plaintiff-Appellee

v.

GROIA & COMPANY, A Professional Corporation

Defendant-Appellee

v.

INGRID FELDERHOF

Defendant-Appellant

Appeal from the United States District Court
for the Southern District of Texas, Houston

ON PETITION FOR REHEARING

(Filed Sep. 14, 2009)

Before JONES, Chief Judge, and PRADO, and HAYNES, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing DENIED

ENTERED FOR THE COURT:

/s/ Edward C. Prado
United States Circuit Judge

Supreme Court, U.S.
FILED
JAN 18 2010
OFFICE OF THE CLERK

No. 09-712

In The
Supreme Court of the United States

INGRID FELDERHOF,

Petitioner,

v.

JENKENS & GILCHRIST, P.C., ET AL.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF IN OPPOSITION BY GROIA & COMPANY

TIMOTHY S. MEHOK
Counsel of Record
ALAN H. GOODMAN
THOMAS M. BENJAMIN
LEMLE & KELLEHER, LLP
Pan American Life Center
601 Poydras St., Suite 2100
New Orleans, LA 70130
(504) 586-1241

Counsel for Respondent, Groia & Company

COCKLE LAW BRIEF PRINTING CO (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Whether an exhaustive evidentiary hearing at which Petitioner appeared, represented by counsel, and presented testimony is sufficient to satisfy the requirements of due process under the Fifth and Fourteenth Amendments to the United States Constitution.

TABLE OF CONTENTS

Page

STATEMENT OF THE CASE 1

REASONS FOR DENYING WRIT 3

I. THE TRIAL COURT'S DECISION DOES NOT CONFLICT WITH SUPREME COURT DECISIONS ON THE ISSUE OF UNWED FATHERS INTEREST IN THEIR RELATIONSHIP WITH THEIR BIOLOGICAL CHILDREN 3

II. THE GEORGIA STATUTE ON DISCRETIONARY APPELLATE REVIEW FOLLOWING A DENIAL OF LEGITIMATION PETITIONS DOES NOT VIOLATE UNWED FATHERS DUE PROCESS RIGHTS 7

CONCLUSION 8

TABLE OF AUTHORITIES

Page

CASES

Binns v. Fairnot, 292 Ga. App. 336 (2008).....5, 6

Caban v. Mohammed, 441 U.S. 380, 99 S. Ct. 1760, 60 L. Ed. 2d 297 (1979).....3, 4

Dept. of Human Resources v. Phillips, 268 Ga. 316, 486 S.E.2d 851 (1997).....7

In re: Baby Girl Eason, 257 Ga. 292, 358 S.E.2d 459 (1988).....3, 4, 5

In re: L.C., 273 Ga. 886, 548 S.E.2d 335 (2001).....7

In the Interest of: A.C., a child, No. S09A0931, Supreme Court of Georgia (2009).....7

Lehr v. Robertson, 463 U.S. 248, 103 S. Ct. 2985, 177 L. Ed. 2d 614 (1983).....3, 4, 5

Quilloin v. Walcott, 434 U.S. 246, 98 S. Ct. 549, 54 L. Ed. 2d 511 (1978).....3

Stanley v. Illinois, 405 U.S. 645 (1972).....3

CONSTITUTIONAL PROVISIONS

U.S. Const. amend. V 8

U.S. Const. amend. XIV 8

STATUTES

O.C.G.A. § 5-6-35(a)(2) 7

O.C.G.A. § 5-6-35(a)(12) 7

TABLE OF AUTHORITIES – Continued

Page

RULES

S. Ct. R. 14 3

STATEMENT OF THE CASE

This action involves Petitioner's efforts to legitimate his then three (3) year old child. Petitioner contends that just because he is the biological father of the child, he has a constitutional right to legitimate the child and that he was denied due process of law when the court denied his claim.

The facts surrounding Petitioner's Petition for Legitimation and the trial court's denial are set forth in the Court's Final Order. App. 6a-12a.[1] Notably, the Trial Court found:

Petitioner and [Respondent] did have a relationship which produced a son born on June 19, 2005. App. 7a. Though present at the birth of the child, Petitioner herein did not provide any financial support or medical care during Respondent's pregnancy or hospitalization for the birth of the minor child despite repeated requests by Respondent. App. 8a. Further, Petitioner did not provide medical insurance for the minor child subsequent to his birth despite repeated requests by Respondent forcing the child to obtain state provided health care insurance coverage. App. 9a.

---

[1] The Petition contains a three-page discussion entitled "STATEMENT OF THE CASE, A. Background of the March 26, 2009 Order." Pet. 2-4. These factual assertions are not supported by citations to the record or the opinions below, and instead are Petitioner's version of the facts, which Respondent disputes.

Petitioner did occasionally visit with the minor child by either traveling to the child or the minor child and Respondent traveling to Petitioner's residence. App. 8a. In 2005, there were approximately seven days; in 2006, approximately fifteen days; in 2007 approximately fourteen days; and nine days in 2008 when Petitioner visited with the minor child. Upon the filing of the Petition for Step-Parent Adoption in August of 2008, Petitioner ceased contact with the minor child because it was awkward. App. 8a-9a.

Petitioner inconsistently paid child support for the minor child, and had sent the minor child a plastic batman car and the movie "Polar Express" as gifts. App. 9a. However, Petitioner insignificantly increased the amount of the support being paid because of his refusal to obtain health insurance for the minor child after his birth and after Respondent's repeated requests for funds to care for their minor child. *Id.* Despite constant requests by Respondent for the Petitioner to take appropriate legal action for the sake of his child, he only did so after Respondent's husband filed the Petition for Step-Parent Adoption. App. 10a. Implicit in the court's findings is the conclusion that Petitioner had no intention of legitimating the child until he was compelled by the pending adoption proceeding to take action.

QUESTION PRESENTED

Did the Fifth Circuit err when it affirmed the District Court's denial of Petitioner's Motion to Vacate Order on Default and to Set Aside Final Judgment, based upon the District Court's finding that Petitioner's default was the result of Petitioner's deliberate and willful conduct?

LIST OF PARTIES

1. Ingrid Felderhof, Petitioner
2. Jenkens & Gilchrist, P.C., Respondent
3. John Felderhof, Respondent
4. Groia & Company Professional Corporation, Respondent

CORPORATE DISCLOSURE STATEMENT

Respondent, Groia & Company Professional Corporation, is a legal professional corporation organized under the laws of, and domiciled in, Canada. Groia & Company Professional Corporation has no parent corporation. All of the stock of Groia & Company Professional Corporation is privately held by an individual, and no public entity holds 10% or more of its stock.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
LIST OF PARTIES	ii
CORPORATE DISCLOSURE STATEMENT	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	iv
STATEMENT OF THE CASE	1
Groia's Representation Of The Felderhofs	1
The Interpleader Action	4
Petitioner's Willful And Deliberate Default	4
PROCEEDINGS BELOW	5
Petitioner's First Appeal	6
The District Court Remand	7
The Fifth Circuit Affirmance	8
REASONS FOR DENYING THE PETITION	8
A. There Is No Real Conflict Nor Important Federal Question	8
B. The Lower Courts' Decisions Do Not Conflict with *Pioneer*	9
C. The District Court Did Not Commit Error	19
CONCLUSION	21

TABLE OF AUTHORITIES

Page

CASES

Beitel v. OCA, Inc. (In re OCA, Inc.), 551 F.3d 359 (5th Cir. 2008) 16

Coomer v. Coomer, 2000 WL 1005211 (4th Cir. July 20, 2000) 16

Dix v. Johnson (In re Dix), 95 B.R. 134 (9th Cir. BAP 1988) 11, 15

Frost v. Subramanian (In re Subramanian), 2007 WL 2310026 (3d Cir. Aug. 14, 2007) 16

Graver Tank & Mftg. Co. v. Linde Air Prods. Co., 336 U.S. 271 (1949) 20

Jenkens & Gilchrist v. Groia & Co., 542 F.3d 114 (5th Cir. 2008) 14

New York v. Green, 420 F.3d 99 (2d Cir. 2005) 16

NLRB v. Hendricks County Rural Elec. Membership Corp., 454 U.S. 170 (1981) 20

Pioneer Investments Servs. Co. v. Brunswick Assocs. Ltd. P'ship, 507 U.S. 380 (1993) ..... *passim*

P.S. Johnson v. Gudmundsson, 35 F.3d 1104 (7th Cir. 1994) 14

TCI Group Life Ins. Plan v. Knoebber, 244 F.3d 691 (9th Cir. 2001) 17

United States v. Johnston, 268 U.S. 220 (1925) 20

Venegas-Hernandez v. Sonolux Records, 370 F.3d 183 (1st Cir. 2004) 15

Williams v. Meyer, 346 F.3d 607 (6th Cir. 2003) 16

TABLE OF AUTHORITIES – Continued

Page

RULES

Fed. R. Bankr. P. 9006(b)(1) 10, 11, 18

Fed. R. Civ. P. 60(b) 9, 16, 17, 18, 20

Fed. R. Civ. P. 60(b)(1) ..... *passim*

Fed. R. Civ. P. 60(b)(4) 5, 6

Fed. R. Civ. P. 13(f) 18

OTHER AUTHORITIES

Gressman, Eugene, *et al.*, *Supreme Court Practice* (9th ed. 2007) 9, 17

Moore, James Wm., *Moore's Federal Practice* (3d ed. 2009) 13

STATEMENT OF THE CASE

Groia's Representation Of The Felderhofs

On or about May 6, 1997 John and Ingrid Felderhof (together, the "Felderhofs") retained Joseph Groia ("Groia"), then a partner with the Canadian law firm of Heenan Blaikie, to provide advice and representation in respect of a variety of matters relating to Bre-X Minerals Ltd. ("Bre-X") and specifically to represent their personal interests regarding any Canadian securities or criminal investigations, proceedings or lawsuits. Contemporaneous with the retention of Groia, the Felderhofs retained the services of Jenkens & Gilchrist, a Professional Corporation ("Jenkens"), to provide similar advice and representation in the United States. On May 16, 1997 the Felderhofs entered into a Modified Legal Representation Agreement with Jenkens (the "Jenkens Modified Agreement"). In connection with the Jenkens Modified Agreement, Ingrid Felderhof (or Petitioner) executed a stock certificate for the entire 200 issued and outstanding shares in Travis Close, Inc. ("Travis Close"). The sole asset of Travis Close was and still is a house in Williamsburg, Virginia that the Felderhofs purchased with funds from the sale of John Felderhof's share of Bre-X and transferred to Travis Close. Felderhof transferred the house outright to Jenkens by way of the stock assignment, free and clear of any liens or encumbrances in

light of her obligations to Jenkens under the Jenkens Modified Agreement.[1]

Five days after the Felderhofs' entry into the Jenkens Modified Agreement, on May 21, 1997, the Felderhofs through John Felderhof entered into a Confidential Advice and Services Agreement with Groia and Heenan Blaikie[2] (the "Groia Retainer Agreement"). Because of the potential for vast and extensive litigation against the Felderhofs, one of Groia and Heenan Blaikie's primary concerns in entering into the Groia Retainer Agreement was to ensure that the Felderhofs provide a retainer to guaranty that there would be sufficient resources available for their defense. Thus, the Groia Retainer Agreement, similar to Jenkens Modified Agreement, provided for a non-refundable retainer whereby the Felderhofs authorized and instructed Jenkens to deliver one-half of the proceeds from the sale of any assets subject to the Jenkens retainer (including, without limitation, the stock in Travis Close, whose sole asset is the Williamsburg house) to Heenan Blaikie. Such proceeds were to be credited toward the

---

[1] After the Felderhofs transferred ownership of the house to Jenkens in 1997, Jenkens exercised its ownership rights in the house and the house has not served as Petitioner's "residence," as she claims. *See* Pet. Br. at 6. Indeed, Groia & Company understands that since the inception of this litigation Petitioner has resided in the Cayman Islands.

[2] As of July 7, 2006 Heenan Blaikie waived any interest in the Groia Retainer and its interest in any earned fees and assigned them to Groia & Company.

Felderhofs' non-refundable general retainer with Heenan Blaikie.

Not surprisingly given the magnitude of the losses arising out of the Bre-X case, the Felderhofs came to be involved in a number of civil, criminal and regulatory proceedings in both the United States and Canada, including but not limited to, class action proceedings naming the Petitioner, Ingrid Felderhof, and a prosecution of John Felderhof by the Ontario Securities Commission. Groia & Company served as solicitors of record for Petitioner, until June 2006 and continued to represent John Felderhof until the Summer of 2007. As a direct result of Groia & Company's representation, the Felderhofs have been successful in defending numerous claims made against them, including an outright acquittal by Mr. Felderhof of eight securities charges for insider trading and participating in certain misleading press releases. Groia & Company is currently owed in excess of $900,000.00 for legal services it provided to the Felderhofs. Half of any proceeds received by Jenkens from the sale of the Williamsburg house will be allocated to reduce Petitioner's debt to Groia & Company. Groia & Company will still be owed a substantial sum after any such allocation.

The Interpleader Action

Nearly three years after its representation of the Petitioner had ended, in September 2006, Petitioner began making unwarranted claims to Jenkens that she owned the Williamsburg house. Given Petitioner's claims and the claims of other parties to the Williamsburg house or its proceeds (including those of Groia & Company and Mr. Felderhof), on November 14, 2006, Jenkens filed an interpleader action in the United States District Court for the Southern District of Texas seeking a declaratory judgment to determine the rightful owner of the Williamsburg home. Jenkens named Groia & Company, Mr. Felderhof and Petitioner as defendants.

Petitioner's Willful And Deliberate Default

After Jenkens filed the interpleader action, Petitioner engaged in an evasive and obstructive course of action designed to frustrate the judicial process and eschew the District Court's authority. Specifically, despite being personally served with the interpleader complaint, Petitioner "never filed an answer nor responded in any way to those pleadings." Pet. App. at 4-5.[3] Subsequently, Petitioner was served with a copy of the District Court's Order for Conference and Disclosure of Interested Parties, which

[3] Citations herein to "Pet. App." are to the Appendix submitted by Petitioner and included with her Petition for Writ of Certiorari.

directed her "to appear for a pre-trial conference and to file, within fifteen days, a certificate of persons or entities with a financial interest in the litigation." *Id.* at 5. Petitioner never filed the certificate despite the Court Order.

On December 15, 2006, due to Petitioner's willful evasion of the interpleader action, Jenkens filed a request for entry of default against Petitioner with the District Court and a hearing was scheduled for January 5, 2007. *Id.* Petitioner was served with the notice of the default request and related hearing, but she did not respond to the motion, nor did she appear at the hearing. *Id.*

On January 5, 2007, the District Court granted Jenkens' motion for entry of default judgment. Thereafter, Jenkens, along with defendants Groia & Company and Mr. Felderhof filed a joint motion for summary judgment asking the District Court to declare Jenkens the lawful owner of the Williamsburg house. On January 10, 2007, the District Court granted the joint motion and entered a final judgment declaring Jenkens as the sole owner of Travis Close and the Williamsburg house.

PROCEEDINGS BELOW

On February 22, 2007, Petitioner filed a motion with the District Court to set aside the entry of default and vacate the final judgment pursuant to Federal Rules of Civil Procedure 60(b)(1) and 60(b)(4).

After receiving the parties' briefs, affidavits and documentary evidence, the District Court denied Petitioner's motion. Pet. App. 15.

Petitioner's First Appeal

Petitioner appealed the District Court's dismissal of her motion to set aside entry of the default judgment to the Fifth Circuit Court of Appeals. On appeal, Petitioner first claimed that the District Court's judgment was void pursuant to Rule 60(b)(4), because she was never served with a summons. The Fifth Circuit found that the record supported the finding that Petitioner was served with the summons on the basis of, among other things, the process server's two affidavits averring that he personally served the complaint and summons on Petitioner. Pet. App. 18. Therefore, the Fifth Circuit held that the District Court did not err in denying Petitioner relief from the default judgment pursuant to Rule 60(b)(4). Petitioner does not appeal this ruling here.

Petitioner next claimed that she should be relieved from the default judgment pursuant to Rule 60(b)(1), which provides that a court "may relieve a party or its legal representative from a final judgment, order, or proceeding [on the grounds of] mistake, inadvertence, surprise or excusable neglect." Fed. R. Civ. P. 60(b)(1). On this question, the Fifth Circuit sought to determine whether good cause existed to set aside the default judgment and whether the District Court abused its discretion in denying

Petitioner's Rule 60(b)(1) motion. Pet. App. at 19-20. While the Fifth Circuit attempted to examine the record in light of certain equitable factors to determine whether good cause existed (*id.* at 19-30), it ultimately remanded the case to the District Court with instructions to issue a more detailed ruling should the District Court's initial ruling be supported by the record. *Id.* at 30-31.

The District Court Remand

On remand, the District Court once again denied Petitioner's motion to set aside the entry of the default judgment and set forth detailed findings supporting its decision. *See, generally,* Pet. App. at 3-10. First, the District Court found that Petitioner refused to communicate with Jenkens regarding the interpleader action and instructed her attorneys not to accept any communications regarding the litigation. *Id.* at 7-8 (finding that Petitioner instructed her attorneys to "'simply destroy'" any communications). Second, the District Court found that Petitioner "willfully ignored the [District Court's] ***repeated instructions and attempts at contact, willfully ignored opposing counsel's attempts to contact her relative to the proceedings, and willfully failed to respond to the claims against her***. . . ." *Id.* at 8 (emphasis added). Indeed, Petitioner only grasped "the serious consequences of the 'games' she played" with the District Court when it entered a final judgment. *Id.* In sum, Petitioner's "failure to respond was due ***not*** to any excusable neglect, but

was rather ***due to her calculated intent to eschew the [District Court's] authority, ignore the realities of litigation, and frustrate the judicial process***." *Id.* at 9 (emphasis added). On that basis, the District Court once again denied Petitioner's motion.

The Fifth Circuit Affirmance

On appeal, the Fifth Circuit affirmed the District Court's decision per curiam. Pet. App. at 2. The Fifth Circuit's standard of review on appeal was whether the District Court's findings were clear error and whether the District Court had abused its discretion. On September 14, 2009, the Fifth Circuit denied rehearing.

REASONS FOR DENYING THE PETITION

A. There Is No Real Conflict Nor Important Federal Question

Petitioner's petition for certiorari does not raise any question that warrants review by this Court. The Fifth Circuit's decision affirming the District Court's denial of Petitioner's Rule 60(b)(1) motion on the grounds that she (i) willfully ignored the interpleader action, (ii) exercised "deliberate disregard" for the District Court's instructions and (iii) played "games" with the District Court does not conflict with the decision of any other Court of Appeals. Nor does it conflict with any decision of this Court. Petitioner

thus has failed to satisfy the criterion of a circuit conflict that most frequently results in this Court granting certiorari. *See* Sup. Ct. R. 10(a); Gressman, Eugene, *et al.*, *Supreme Court Practice* 241 (9th ed. 2007) ("Still, there must be a real or 'intolerable' conflict on the same matter of law or fact, not merely an inconsistency in dicta or in the general principles utilized."). Moreover, the petition utterly fails to identify an important unresolved question of federal law that needs to be decided by this Court. *Id.* ("No longer is it enough, if it ever was, to allege a conflict among decisions without demonstrating that the conflict revolves around an 'important' question of federal law."). Rather, the issue that Petitioner raises (vacation of a default judgment under Rule 60(b)'s excusable neglect standard) has been considered in a consistent manner by the Courts of Appeals and this Court's review can add little, if anything, to the body of case law that exists. The case at hand turns upon its own intensive facts, particularly due to Petitioner's egregious conduct (as found by the District Court) and does not implicate important questions of federal law.

B. The Lower Courts' Decisions Do Not Conflict with *Pioneer*

Petitioner attempts to manufacture a conflict by arguing that the Fifth Circuit's affirmance of the District Court does not comport with this Court's decision in *Pioneer Investments Servs. Co. v. Brunswick Assocs. Ltd. P'ship*, 507 U.S. 380 (1993)

and therefore creates a conflict with decisions from other Courts of Appeals that have applied the standard articulated in *Pioneer*. In *Pioneer*, Brunswick (a creditor of Pioneer, the chapter 11 debtor) was required to file proofs of claim in order to participate in the distribution of Pioneer's estate. *Id.* at 383. After receiving notice of the meeting of the creditors, Brunswick hired an attorney who assured Brunswick that the situation was not urgent because the court had yet to set the deadline by which proofs of claim must be filed. *Id.* at 384. By the time that Brunswick's counsel discovered that the notice of the meeting of creditors had, in fact, provided notice of the deadline, Brunswick's proofs of claim were twenty days late. *Id.* Thereupon, Brunswick's counsel submitted the proofs of claim along with a motion requesting that the court permit the late filing on the basis of excusable neglect pursuant to Bankruptcy Rule 9006(b)(1).[4] *Id.*

The bankruptcy court refused the late-filed proofs of claim, finding that "excusable neglect" can only exist where a party's failure to timely perform a duty

---

[4] Bankruptcy Rule 9006(b)(1) provides in pertinent part:

> [W]hen an act is required or allowed to be done at or within a specified period by these rules or by a notice given thereunder or by order of court, the court for cause shown may at any time in its discretion . . . (2) on motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect.

Fed. R. Bankr. P. 9006(b)(1).

was due to circumstances beyond its reasonable control. *Id.* at 384. On appeal, the district court affirmed in part and reversed in part and required the bankruptcy court on remand to evaluate whether Brunswick's conduct constituted excusable neglect pursuant to a five factor test elucidated in *Dix v. Jophnson (In re Dix)*, 95 B.R. 134, 138 (9th Cir. BAP 1988). *Id.* at 385. Upon applying the five factor test on remand, the bankruptcy court once again denied Brunswick's motion and the district court affirmed. *Id.* at 385-86. On appeal, the Sixth Circuit Court of Appeals agreed with the District Court that "excusable neglect" was not limited to cases where the failure to act was beyond the movant's control and that the *Dix* factors were helpful guides in determining whether "excusable neglect" exists. *Id.* at 386. However, the Sixth Circuit reversed, on the basis that the bankruptcy court had misapplied one of the so-called *Dix* factors. This Court granted certiorari in order to resolve the conflict among the Courts of Appeals over whether excusable neglect (i) requires a strict showing that the delay was caused by circumstances beyond the movant's control as trumpeted by Pioneer or (ii) should be analyzed under a more flexible analysis, such as the *Dix* analysis endorsed by the Sixth Circuit. *Id.* at 387 & n.3.

In affirming the Sixth Circuit decision requiring a flexible analysis of excusable neglect under Bankruptcy Rule 9006(b), this Court applied a two-part analysis of what constitutes "excusable neglect." *First*, the Court sought to determine what constitutes

"neglect" and cited Webster's Ninth New Collegiate Dictionary for the plain meaning of "neglect." *Id.* at 388. The Court found that the definition establishes the "ordinary meaning" of "neglect" and indicates that Congress intended that "courts would be permitted, where appropriate, to accept late filings caused by inadvertence, mistake, or carelessness, as well as by intervening circumstances beyond the party's control." *Id. Second*, once a movant establishes such "neglect," it must then be determined whether such neglect is "excusable." *Id.* at 395. In the context of answering this latter question, the Court mentions four possible considerations that could be factored into the equitable determination of whether a party's "neglect" is excusable. *Id.* The considerations are as follows: (i) danger of prejudice to the debtor, (ii) length of the delay and its impact on the proceedings, (iii) the reason for the delay and (iv) whether the movant acted in good faith. *Id.*

Petitioner claims that the Fifth Circuit erred in the case at bar, because it failed to require the District Court to apply the foregoing factors to Petitioner's willful default and therefore, the Fifth Circuit's Rule 60(b)(1) analysis conflicts with *Pioneer*. Pet. Br. at 11-12. This claim is wrong for several glaring reasons.

First, to apply the *Pioneer* factors with regular uniformity to every Rule 60(b)(1) motion to determine if a party's neglect is excusable unnecessarily presumes that the first part of this Court's analysis under *Pioneer* (*i.e.*, whether neglect exists in the first

place) is always met. By definition, where a party's omission is caused by willful or deliberate conduct, there can be no neglect. *See Pioneer*, 507 U.S. at 388 (this Court defining "neglect" as including "inadvertence, mistake, or carelessness"). Indeed, with respect to "excusable neglect" under Rule 60(b)(1), *Moore's Federal Practice* states that:

> The principle that willful or deliberate conduct, including deliberate or persistent inattention to obligations, rules, or orders, mitigates against relief is not limited to the context of relief from default judgments. In any context, deliberate or willful conduct on the part of the person seeking relief from the judgment precludes, by its very nature, a finding of "mistake" or "inadvertence" or "surprise" or "excusable neglect."

12 James Wm. Moore, *Moore's Federal Practice* § 60.41[1][c][i] (3d ed. 2009). In the case at bar, the District Court definitively found that Petitioner willfully ignored the interpleader action and the orders of the District Court. *See* Pet. App. at 8 (Petitioner's "***willfulness*** included ***Felderhof's defiance*** toward orders of this Court") (emphasis added); *id.* ("Felderhof ***willfully ignored*** the Court's repeated instructions and attempts at contact, ***willfully ignored*** opposing counsel's attempts to contact her relative to the proceedings, and ***willfully failed to respond*** to the claims against her in this case") (emphasis added); *id.* at 9 ("Felderhof's failure to respond was due not to any excusable neglect, but was rather due to her ***calculated intent to eschew***

the Court's authority, ***ignore the realities of litigation***, and ***frustrate the judicial process*** relative to this matter") (emphasis added); *id.* ("Felderhof treated this litigation, and her responsibilities as a party to it, with ***blatant disregard***") (emphasis added); *id.* ("the Court finds that Felderhof acted ***willfully*** in refusing to properly participate in the litigation") (emphasis added). Neither *Pioneer* nor any other case suggests that a party's willful and deliberate conduct will be excused by other equitable factors.

Because Petitioner's omission was willful and not neglectful, there would be no reason for the District Court, nor the Fifth Circuit, to analyze (whether under the factors listed in *Pioneer* or some other flexible approach) whether such willful omission was excusable.[5] *See Jenkens & Gilchrist v. Groia & Co.*, 542 F.3d 114, 120 (5th Cir. 2008) (if the district court finds the movant's "default to be willful, then the district court need not make any other finding"); *P.S. Johnson v. Gudmundsson*, 35 F.3d 1104, 1117 (7th Cir. 1994) (district court did not abuse its discretion in entering default judgment where party's "course of conduct amounts to a ***flagrant and willful disregard*** for the court's scheduling orders, the Federal Rules of Civil Procedure . . . ") (emphasis

---

[5] Nevertheless, the Fifth Circuit did, in fact, consider equitable factors substantially similar to those mentioned by this Court in *Pioneer* in Petitioner's first Fifth Circuit appeal, as discussed in Respondent Jenkens' Opposition Brief.

added); *cf. Venegas-Hernandez v. Sonolux Records*, 370 F.3d 183, 187 (1st Cir. 2004) (denying Rule 60(b)(1) motion where movant's "decision not to respond appears to have been ***willful***") (emphasis added). It bears repeating that this is not a case where Petitioner was merely negligent or shared some undefined measure of culpability with respect to her failure to respond. As the District Court emphatically repeated, Petitioner's conduct was "willful," "defian[t]," and "blatant," which goes far beyond mere negligence or culpability. Petitioner's actions sought to manipulate the legal process and disrespectfully snubbed the imprimatur of the District Court and the judiciary as a whole. Such a calculated course of conduct does not and can never constitute neglect.

Second, this Court certainly did not mandate that the four factors listed in *Pioneer* be applied with rigid precision to every case of a party's omission under Rule 60(b)(1), as Petitioner posits. The four factors were merely plucked from the Sixth Circuit's opinion (as originally articulated in *Dix*) from which the *Pioneer* appeal emanated. *See Pioneer*, 507 U.S. at 395 ("we are in substantial agreement with the factors identified by the Court of Appeals"). This Court did not endorse them as the only standard to be applied in every context in *Miranda*-like fashion. Indeed, with the multitude of varying fact-specific circumstances that arise under Rule 60(b)(1) (including compelling circumstances where the movant is willfully defiant to the district court, as in the case at bar), courts must be left with some flexibility in

their determination of what constitutes "excusable neglect." *See Pioneer*, 507 U.S. at 392 (excusable neglect is "elastic" concept); *id.* at 395 (determination of excusable neglect is "at bottom an equitable one"); *id.* (extending "flexible meaning" to excusable neglect).

Furthermore, with near uniformity, the Courts of Appeals post-*Pioneer* have applied equitable factors to cases arising under Rule 60(b)(1) that are comparable in substance to *Pioneer*, even if they do not cite *Pioneer* or organize the factors to be considered in exactly the same way. *See, e.g.*, *New York v. Green*, 420 F.3d 99, 108 (2d Cir. 2005) (factors to analyze under Rule 60(b) claim of excusable neglect include culpability, prejudice and whether movant has a meritorious claim); *Frost v. Subramanian (In re Subramanian)*, 2007 WL 2310026, at *3 (3d Cir. Aug. 14, 2007) (factors to analyze under Rule 60(b) claim of excusable neglect include culpability, prejudice and whether movant has a meritorious claim); *Coomer v. Coomer*, 2000 WL 1005211, at *4 (4th Cir. July 20, 2000) (factors to analyze under Rule 60(b) claim of excusable neglect include timeliness, prejudice, whether movant has a meritorious claim and whether there are exceptional circumstances); *Beitel v. OCA, Inc. (In re OCA, Inc.)*, 551 F.3d 359, 369 (5th Cir. 2008) (factors to analyze under Rule 60(b) claim of excusable neglect include willfulness, prejudice, whether a meritorious defense was presented and public interest); *Williams v. Meyer*, 346 F.3d 607, 613 (6th Cir. 2003) (factors to analyze under Rule 60(b)

claim of excusable neglect include culpability, prejudice and whether movant has a meritorious claim); *TCI Group Life Ins. Plan v. Knoebber*, 244 F.3d 691, 696 (9th Cir. 2001) (factors to analyze under Rule 60(b) claim of excusable neglect include culpability, prejudice and whether movant has a meritorious claim).

Would Petitioner have this Court believe that all of these Courts of Appeals have missed the *Pioneer* mark merely because the factors analyzed are not presented in exactly the same manner?[6] Certainly not. While the analyses of the Courts of Appeals may not include a citation to *Pioneer* and apply the precise rubric that it suggests, the decisions certainly do not conflict with *Pioneer*. Rather, they all apply flexible, equitable analyses to determine whether a party's omission constitutes excusable neglect – analyses that are substantially similar to that set forth in *Pioneer*. They also do not conflict with the decisions of other Courts of Appeals. Gressman, Eugene, *et al.*, *Supreme Court Practice* 242 (9th ed. 2007) ("A genuine conflict, as opposed to a mere conflict in principle, arises when it may be said with confidence that two

---

[6] As Petitioner notes, certain Courts of Appeals have applied the *Pioneer* factors to cases of excusable neglect. Pet. Br. at 9-11. That certain courts under the peculiar facts of those cases have determined to apply such factors is of no moment here and does not create a conflict. In any event and as discussed previously, Petitioner's willful conduct precludes any finding of neglectfulness, the threshold requirement under *Pioneer*.

courts have decided the same legal issue in opposite ways, based on their holdings in different cases with very similar facts.").

Third, this Court in *Pioneer* never held that its analysis of excusable neglect under Bankruptcy Rule 9006 must apply to cases of excusable neglect under Rule 60(b)(1) outside of the bankruptcy context. Rather, this Court merely relied upon interpretations of excusable neglect under Rules 6(b), 13(f) and 60(b)(1) in formulating its analysis. Compelling reasons exist for not extending this Court's interpretation of excusable neglect under Bankruptcy Rule 9006(b) to cases interpreting excusable neglect under Rule 60(b)(1). In *Pioneer*, this Court justified its interpretation of "excusable neglect" under Bankruptcy Rule 9006 by arguing that the policies underlying Chapter 11 and the Bankruptcy Rules require it. *Pioneer*, 507 U.S. at 389. This Court went to great lengths to explain how the historical underpinnings of Bankruptcy Rule 9006(b) and its predecessors in the Bankruptcy Act require bankruptcy courts to analyze excusable neglect under a flexible analysis. *Id.* at 390 (under prior Bankruptcy Act, courts were "entrusted with the authority" "to accept tardy filings 'in accordance with the equities of the situation'") (citations omitted).

Indeed, in order to reconcile the joint aims of rehabilitating the debtor and avoiding forfeitures by creditors, bankruptcy courts must necessarily exercise broad equitable powers, including the power to allow late-filed claims under compelling

circumstances. This end can ostensibly be achieved through the *Pioneer* analysis, however, such end is not necessarily always appropriate in the context of traditional litigation. This is especially so in light of certain of the mitigating factors identified by the Court in *Pioneer* that are specific to bankruptcy cases, such as the fact that (i) Pioneer's plan of reorganization accounted for Brunswicks' claims in any event and (ii) that the notice of bar date was inconspicuously displayed in a notice of meeting of creditors, which is uncharacteristic of bar date notices. *Id.* at 398-99.

C. The District Court Did Not Commit Error

Petitioner claims that the Fifth Circuit erred, because it failed to find that the District Court committed error in making certain factual findings that led to its conclusion that Petitioner's default was willful. Specifically, Petitioner lists six findings and then attempts to explain why each such finding is erroneous. In an exercise of prudence, Respondent will not engage in a nuanced factual tit-for-tat with Petitioner in this Court.[7] Suffice it to say, the Fifth Circuit found that the District Court made its findings "[a]fter receiving briefing, affidavits, and documentary evidence." Pet. App. 15. The District

---

[7] Respondent, Groia & Company, agrees with and hereby incorporates the Misstatements of Fact submitted by Respondent, Jenkens, in its Brief in Opposition.

Court had sufficient evidence before it to make its findings and conclude that Petitioner's default was willful. Likewise, Petitioner had ample opportunity to submit evidence and make arguments in support of her Rule 60(b) motion. The Fifth Circuit certainly did not err in affirming the District Court's decision, ostensibly finding that the District Court's findings were not erroneous and that it did not abuse its discretion in denying Petitioner' Rule 60(b) motion.

More importantly, however, this Court does "not grant a certiorari to review evidence and discuss specific facts." *United States v. Johnston*, 268 U.S. 220, 227 (1925); *see also NLRB v. Hendricks County Rural Elec. Membership Corp.*, 454 U.S. 170, 176 n.8 (1981) (improvident grant of cross-petition that presented "primarily a question of fact," "which does not merit Court review"); Sup. Ct. Rule 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings . . . "). It is the responsibility of the Courts of Appeals to review and assess a record to determine if a district court committed error in making findings and this Court should not grant certiorari where findings receive the concurrence of a Court of Appeals. *See Graver Tank & Mftg. Co. v. Linde Air Prods. Co.*, 336 U.S. 271, 275 (1949) ("A court of law, such as this Court is, rather than a court for correction of errors in fact finding, cannot undertake to review concurrent findings of fact by two courts below in the ***absence of a very obvious and exceptional show of error.***") (emphasis added);

Pioneer, 507 U.S. at 397 ("Nor would we be inclined in any event to unsettle factual findings entered by a Bankruptcy Court and affirmed by both the District Court and Court of Appeals.") (citations omitted). Petitioner fails to show an obvious and exceptional show of error by the District Court and the Fifth Circuit sufficient to warrant this Court's grant of certiorari to review factual findings.

CONCLUSION

For these reasons, this Court should deny Petitioner's Petition for Certiorari.

Respectfully submitted,

TIMOTHY S. MEHOK
Counsel of Record
ALAN H. GOODMAN
THOMAS M. BENJAMIN
LEMLE & KELLEHER, LLP
Pan American Life Center
601 Poydras St., Suite 2100
New Orleans, LA 70130
(504) 586-1241
Counsel for Respondent,
Groia & Company

No. 09-712

Supreme Court, U.S.
JAN 18 2010
OFFICE OF THE CLERK

In The Supreme Court of the United States

INGRID FELDERHOF,

Petitioner,

v.

JENKENS & GILCHRIST, P.C., et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF IN OPPOSITION OF JENKENS & GILCHRIST, P.C. TO PETITION FOR WRIT OF CERTIORARI

DANIEL V. FLATTEN
PORTER & HEDGES, L.L.P.
1000 Main Street, 36th Floor
Houston, Texas 77002-6336
Telephone: (713) 226-6664
Facsimile: (713) 226-6264
E-mail: dflatten@porterhedges.com

Attorneys for Respondent Jenkens & Gilchrist, A Professional Corporation

COCKLE LAW BRIEF PRINTING CO (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

1. Whether a willful refusal to file an answer after proper service constitutes excusable neglect under FED. R. CIV. P. 60(b)(1).

2. Whether the United States Court of Appeals for the Fifth Circuit correctly applied a "clearly erroneous" standard in reviewing the district court's findings on Petitioner's claim of excusable neglect under FED. R. CIV. P. 60(b)(1).

LIST OF PARTIES

The following list identifies all of the parties appearing here and before the United States Court of Appeals for the Fifth Circuit.

1. Ingrid Felderhof, Petitioner and Appellant below

2. Jenkens & Gilchrist, P.C., Respondent and Appellee below

3. John Felderhof, Respondent and Appellee below

4. Groia & Company, Respondent and Appellee below

CORPORATE DISCLOSURE STATEMENT

Respondent Jenkens & Gilchrist, P.C., is a professional corporation. There are no parent corporations or publicly held companies owning 10% of Respondent's stock.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
LIST OF PARTIES	ii
CORPORATE DISCLOSURE STATEMENT	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
STATEMENT OF JURISDICTION	2
FEDERAL RULE OF CIVIL PROCEDURE INVOLVED	2
STATEMENT OF FACTS	3
A. Factual Background	3
B. Course of Proceedings Below	6
C. Objections to Petitioner's Statements of Fact	8
SUMMARY OF THE ARGUMENT	12
ARGUMENT AND AUTHORITIES	13
A. The *Pioneer* Factors	13
B. Culpable/Willful/Intentional Failure	17
C. Narrowness of District Court's Analysis	17
D. Conflict Among the Circuits	18
E. The Trial Court's Findings	18
CONCLUSION	20

TABLE OF AUTHORITIES

Page

CASES

Browder v. Director, Dep't of Corrections of Illinois, 434 U.S. 257, 98 S.Ct. 556, 54 L.Ed.2d 521 (1978) 11

Burrell v. Henderson, 434 F.3d 826 (6th Cir. 2006) 18

Cacevic v. City of Hazel Park, 226 F.3d 483 (6th Cir. 2000) 11, 14

Feeney v. AT&E, Inc., 472 F.3d 560 (8th Cir. 2006) 16

Gucci American, Inc. v. Gold Center Jewelry, 158 F.3d 631 (2d Cir. 1998), *cert. den.*, 525 U.S. 1106, 119 S.Ct. 873, 142 L.Ed.2d 74 (1999) 16

Lemoge v. United States, 587 F.3d 1188 (9th Cir. 2009) 16

Pioneer Inv. Services Co. v. Brunswick Associates Ltd. Partnership, 507 U.S. 380, 113 S.Ct. 1489, 123 L.Ed.2d 74 (1993) ..... *passim*

Union Pacific Railroad Co. v. Progress Rail Services Corp., 256 F.3d 781 (8th Cir. 2001) 16

LEGAL TREATISES

12 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE, § 60.22 (3d ed. 2009) 16

TABLE OF AUTHORITIES – Continued

Page

12 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE, § 60.41 (3d ed. 2009) 16

12 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE, § 60.22[3][b] (3d ed. 2009) 18

12 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE, § 60.41[1][c][i] (3d ed. 2009) 17

8 CHARLES ALAN WRIGHT, ARTHUR R. MILLER, & MARY KAY KANE, FEDERAL PRACTICE AND PROCEDURE § 2871 (1995) 11

8 CHARLES ALAN WRIGHT, ARTHUR R. MILLER, & MARY KAY KANE, FEDERAL PRACTICE AND PROCEDURE § 2872 (1995) 11

9 CHARLES ALAN WRIGHT, ARTHUR R. MILLER, & MARY KAY KANE, FEDERAL PRACTICE AND PROCEDURE § 3950.4 (1995) 11

RULES

SUP. CT. R. 10 20

SUP. CT. R. 12(7) 3

SUP. CT. R. 15 8

FED. R. APP. P. 4 ..... 7, 11, 12

FED. R. APP. P. 4(a)(4)(A)(vi) 11

FED. R. CIV. P. 59 ..... 7, 11, 12

FED. R. CIV. P. 60 11

FED. R. CIV. P. 60(b) 11

TABLE OF AUTHORITIES – Continued

Page

FED. R. CIV. P. 60(b)(1).....*passim*

FED. R. CIV. P. 60(b)(4).....1, 7

OPINIONS BELOW

Jenkens & Gilchrist v. Groia & Co., 542 F.3d 114 (5th Cir. 2008), *cert. den.*, 129 S.Ct. 1585 (2009), ("*Jenkens I*"). Pet. App. 11. In Petitioner's first appeal of the trial court's denial of her motion to vacate the judgment, the United States Court of Appeals for the Fifth Circuit (hereinafter "Circuit Court") remanded the case for either (1) fact findings on the record or (2) further hearing to develop additional evidence, on the question whether the Petitioner's failure to file an answer after proper service was *willful*. The Circuit Court also found: (1) service of process on Petitioner *did* include the summons (Petitioner's initial basis for seeking vacation of the judgment was that it did not) and (2) Petitioner's Rule 60(b)(4) claim that the judgment was void failed as a matter of law.

Jenkens & Gilchrist v. Groia & Co., et al., Cause No. C.A. H-06-3590 (United States District Court for the Southern District of Texas, Houston Division, Order of October 1, 2008; Pet. App. 3). On remand, the trial court entered a detailed Order making specific findings of willfulness in Petitioner's failure to file an answer.

Jenkens & Gilchrist v. Groia & Co., (unpublished) Cause No. 08-20642 (5th Cir. Aug. 12, 2009, *per curiam*) ("*Jenkens II*"). Pet. App. 1. In Petitioner's second appeal, the Circuit Court affirmed *per curiam*. On September 14, 2009, the Circuit Court denied rehearing. Pet. App. 35.

STATEMENT OF JURISDICTION

This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1). The judgment of the United States Court of Appeals for the Fifth Circuit was entered on August 12, 2009. Petitioner's Motion for Rehearing was denied on September 14, 2009.

FEDERAL RULE OF CIVIL PROCEDURE INVOLVED

Although Federal Rule of Civil Procedure 60(b)(1) is set out in the petition, Respondent Jenkens & Gilchrist, P.C. sets it out here for ease of reference.

Federal Rule of Civil Procedure 60(b)(1):

> (b) Grounds for Relief from a Final Judgment, Order, or Proceeding. On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons:
>
> (1) mistake, inadvertence, surprise, or excusable neglect.

STATEMENT OF FACTS[1]

A. Factual Background

Now and at all material times, Petitioner is and has been an Australian national living in the Cayman Islands. R. 13, 237. Her former husband, John Felderhof, is a Canadian national formerly living in Indonesia (R. 13) and now believed to be living in the Philippine Islands.

In 1997, the Felderhofs hired Jenkens & Gilchrist, P.C. (hereinafter "Jenkens") to represent them in U.S. regulatory, criminal and civil claims arising from the bankruptcy of John Felderhof's employer, Bre-X Minerals Ltd., a Canadian company. R. 14, 30-33, 237. At the same time, they hired the Heenan Blaikie law firm in Toronto to represent them in similar Canadian proceedings. R. 14.

In May 1997, the Felderhofs executed a modified retainer agreement in which they promised to pay Jenkens an earned and nonrefundable retainer of $1 million in addition to hourly fees. R. 45-53. They made a parallel agreement with Heenan Blaikie. R. 162 and Groia briefs in Fifth Circuit. Jenkens represented the Felderhofs in various courts throughout the protracted U.S. proceedings. Petitioner disputes the applicability of the Heenan Blaikie agreement to her, as she apparently did not sign the Canadian

---

[1] Record references are to the record of the U.S. Court of Appeals for the Fifth Circuit per SUP. CT. R. 12(7).

agreement (R. 162), but she makes no such contention as to Jenkens. Petitioner's quarrel with Heenan Blaikie and its successor, Groia & Company ("Groia"), is not the subject of this dispute.

In partial payment of the retainer, Jenkens accepted the Felderhofs' interest in Travis Close, a closely held investment vehicle whose sole asset was a residential property (but not Petitioner's residence) near Williamsburg, Virginia. R. 15, 35-38. Jenkens reported as income and paid taxes on one-half its appraised value (approximately $360,000.00) (R. 24-25), the other half being attributable to Heenan Blaikie consistent with the parallel agreements between the Felderhofs and the two law firms.

During the next nine years, Jenkens listed the property for sale, leased it, paid taxes, repairs and utilities on it, and exercised all the rights and obligations of ownership without question or complaint by Petitioner. R. 24-25. Jenkens also accepted, sold and divided with Heenan Blaikie the proceeds of sale of a Lamborghini automobile under this same agreement, again without contest or complaint by Petitioner. R. 187.

In October 2001, Petitioner secured a Dominican Republic divorce from John Felderhof.[2]

---

[2] Although not in the formal record, this divorce is not disputed, and both parties have referred to it throughout these proceedings. In fact, Petitioner relies on it in her dispute with Groia. *See* Petitioner's brief in 07-20296 in the U.S. Court of Appeals for the Fifth Circuit.

On October 1, 2003, Jenkens' representation of Petitioner ended. Appellee's Brief in Fifth Circuit, p. 11.

In September 2006, nine years after the transfer and nearly three years after Jenkens' representation of Petitioner had ended, Petitioner demanded "return" of the Travis Close property. R. 215-216. She claimed for the first time, and despite explicit language to the contrary in the modified retainer agreement, that it had been security for other fees and not a fee itself. *Id.*

Jenkens disputed Petitioner's claim and attempted to resolve the dispute which involved not only Petitioner, but also Groia and Petitioner's former husband, John Felderhof. R. 24-25, 193-195, 217.

Petitioner rejected anything but unconditional transfer to her with no provision for John Felderhof, or the unpaid fees to Groia, as successor to Heenan Blaikie. R. 189, 191-192, Tab A of Appellant's Fifth Circuit Brief.

Beginning in late October 2006, Petitioner refused to accept any communication from Jenkens by which her receipt could be verified. R. 297, 319. She rejected FedEx deliveries and facsimiles. R. 297-298, 319, 322. She instructed the law firm representing her at the time not to accept, forward or respond to any further communications from Jenkens *but to destroy them*. R. 278-279. Consistent with that, Jenkens' request for the new contact information for her lawyer (who had changed offices) went

unanswered. *Id.* Faced with that intransigence, Jenkens filed an interpleader/declaratory judgment suit naming Petitioner, her former husband, and Groia as defendants on November 14, 2006. R. 12-64.

B. Course of Proceedings Below

Jenkens filed its interpleader/declaratory judgment suit in the U.S. District Court for the Southern District of Texas on November 14, 2006. Groia and Petitioner's former husband, John Felderhof, waived service and entered an appearance in the suit. R. 74-78, 88-92.

Petitioner was personally served in the Cayman Islands on November 16, 2006. R. 107, 273, 370-371. Jenkens also sought service under the Hague Convention, but Petitioner "willfully avoided" that service. R. 303-304. The November 16 service included an Order for Conference and Disclosure of Interested Parties (R. 66), and a second copy of that Order was served on her about two weeks later. R. 189-190. Among other things, that Order directed Petitioner to file a certificate of persons or entities with a financial interest within fifteen days. R. 66. She never filed the certificate or an answer. *Id.*

The court entered a default order on January 5, 2007 (R. 125) and pursuant to agreement of the parties who did answer, an agreed judgment on January 9, 2007. R. 139-140. The judgment awarded the property to Jenkens but anticipated sale and

awarded half the net proceeds of the sale to Groia, consistent with the 1997 agreements. *Id.*

Although she learned of the judgment the day after it was filed (Pet. p. 11), Petitioner did not file a motion for new trial under FED. R. CIV. P. 59 or a timely appeal pursuant to FED. R. APP. P. 4 but an out-of-time motion to vacate the judgment under FED. R. CIV. P. 60(b)(1) and 60(b)(4). R. 145-230. In her motion, she admitted receiving the service but claimed it did not include a summons so that she did not know and could not know an answer was due. *Id.*

On April 2, 2007, after a thorough briefing by all parties, the trial court denied Petitioner's motion to vacate. R. 421-422.

On August 28, 2008, the U.S. Court of Appeals for the Fifth Circuit affirmed the denial of relief under FED. R. CIV. P. 60(b)(4) and held that the service *did* include the summons as a *matter of law* but remanded the case for the limited purpose of more detailed findings on the willfulness of Petitioner in failing to answer (*Jenkens I*). Pet. App. 11.

On October 1, 2008, the trial court issued its detailed order explicitly finding Petitioner's failure to answer was willful. Pet. App. 3.

On August 12, 2009, the Circuit Court affirmed *per curiam* (Pet. App. 1) applying a "clearly erroneous" abuse of discretion standard of review (*Jenkens II*). On September 14, 2009, the Circuit Court denied rehearing. Pet. App. 35.

C. Objections to Petitioner's Statements of Fact

Pursuant to Supreme Court Rule 15, Jenkens notes the following misstatements of fact in Petitioner's petition. (For the sake of brevity, the misstatements are paraphrased.)

Willfulness:

1. *Petitioner did not act willfully in failing to answer the complaint.* Pet. p. 6. The trial court found willfulness, and the Circuit Court affirmed that finding applying a clear error/abuse of discretion standard of review. Pet. App. 3, 11.

The Retainer Agreement:

2. *Petitioner's husband alone hired Jenkens to represent him.* Pet. p. 2. Both Petitioner and her husband hired Jenkens, both signed the modified retainer agreement, and the firm acted for both throughout its representation. R. 30-33, 237.

3. *The Williamsburg property was Petitioner's residence.* Pet. pp. 2, 6. The property was not Petitioner's residence and in fact, when she demanded its "return" in 2006, she asked Jenkens to facilitate its sale and transfer the sale proceeds to her for purchase of a Cayman Island property for her son. R. 215-216.

4. *The transfer of Travis Close and its sole asset, the Williamsburg, Virginia property, was to secure payment of future fees rather than a fee itself.* Pet. p. 2.

The modified retainer agreement specifically provided that this was a nonrefundable, earned retainer *in addition to* hourly fees. R. 49-54.

5. *Jenkens instructed Petitioner to transfer Travis Close.* Pet. p. 2. Neither Travis Close nor any specific property was mentioned in the modified retainer agreement. R. 49-54. It was just one of two properties (the other being a Lamborghini automobile, R. 263) the Felderhofs transferred in payment of this obligation.

6. *Jenkens promised to return the property.* Pet. p. 2. The modified retainer agreement makes clear the fee was nonrefundable, and the transfer was unconditional. R. 49-54. Anything less would not have been acceptable to Jenkens, and it would have been a fraud on the Felderhofs' numerous creditors, the regulatory authorities, and the Canadian bankruptcy court, which still claims any portion of the sale proceeds not going to Jenkens or Groia.

7. (Implied) *The Petitioner's demand for "return" of the Travis Close property came immediately after Jenkens' representation of Petitioner had ended* (Pet. p. 2). Jenkens' representation of Petitioner ended in October 2003. The demand did not come until September 2006. R. 215-216.

***Service of Process*:**

8. *The service of process did not include a summons.* Pet. p. 3. The trial court found and the Circuit Court affirmed that the record showed service included the

summons as a *matter of law*. Pet. App. 11; R. 107, 273, 275-276, 370-371.

9. (Omission) Petitioner failed to file the certificate of interested persons required by the Order of Conference with which she admits being served. Pet. App. 5.

10. (Omission) The Grand Court of the Cayman Islands certified that Petitioner "willfully avoided service" under the Hague Convention at her two Cayman residences. R. 303-304.

***Notices and Communications*:**

11. *The Cayman postal service did not deliver the various notices and communications because they were addressed to a physical address rather than a P.O. Box.* Pet. p. 4. This argument was raised for the first time in Petitioner's second appeal to the Circuit Court, long after the record had been closed. Her briefing in the trial court blamed her failure to receive such notices on a private gate guard in her gated community. R. 350. It is the same address she used in her Dominican Republic divorce, the same address at which she *refused* FedEx deliveries – which require a physical address – and the same address at which she received other communications.

12. *Jenkens "waited until" December 27 to send notice of the January 5 default hearing.* Pet. p. 4. That is not the date Jenkens sent it but the date it was mailed from the Cayman law firm Jenkens had

hired to insure compliance with Cayman law. R. 288-289.

***The Judgment*:**

13. *The judgment was a default judgment.* Pet. p. 5. While Petitioner defaulted, the judgment was a summary judgment agreed to by the parties who *had* entered an appearance. R. 139-140. The question before the Fifth Circuit was not the merits of the judgment but of the denial of the out-of-time Rule 60 motion to vacate. *See* Fifth Circuit's Order of June 19, 2007; FED. R. APP. P. 4(a)(4)(A)(vi); FED. R. CIV. P. 60(b); *Browder v. Director, Dep't of Corrections of Illinois,* 434 U.S. 257 (1978); *Cacevic v. City of Hazel Park*, 226 F.3d 483 (6th Cir. 2000); 8 CHARLES ALAN WRIGHT, ARTHUR R. MILLER, MARY KAY KANE, FEDERAL PRACTICE AND PROCEDURE §§ 2871, 2872 (1995); 9 CHARLES ALAN WRIGHT, ARTHUR R. MILLER, & MARY KAY KANE, FEDERAL PRACTICE AND PROCEDURE § 3950.4 (1995).

14. (Implied) *Petitioner acted immediately on receipt of notice of the judgment.* Pet. p. 6. Petitioner learned of the judgment on January 11, 2007, the day after it was filed. She did not file a timely motion for new trial (FED. R. CIV. P. 59) or notice of appeal. FED. R. APP. P. 4. She did not file her Rule 60 motion until February 23, 2007, forty-four days later. R. 145.

***The District Court's Order*:**

15. *In its October 1, 2008 order, the district court declined to consider any factor other than Petitioner's*

willfulness in failing to answer. Pet. p. 7. That was the only question on which the case was remanded for the district court to consider. Pet. App. 31.

SUMMARY OF THE ARGUMENT

Although duly served, Petitioner failed to answer or make other appearance in this interpleader/declaratory judgment case.[3] She also failed to file a certificate of interested parties pursuant to an Order of Conference which she admits receiving. The trial court entered an order of default as to her, and five days later, entered a judgment agreed to by the parties who did answer. Although Petitioner learned of the judgment the next day, she did not file a motion for new trial (FED. R. CIV. P. 59) or a notice of appeal (FED. R. APP. P. 4), but forty-four days later, an out-of-time Rule 60 motion to vacate. After comprehensive briefing, the court denied that motion.

The Circuit Court affirmed in part but remanded for the limited purpose of determining whether Petitioner's failure to file answer was willful. In a second order, the district court made detailed findings of willfulness. The Circuit Court affirmed *per curiam*.

---

[3] Although Petitioner "willfully avoided service" under the Hague Convention, valid personal service was obtained under Cayman and U.S. law. R. 282-283.

The Circuit Court applied the correct standard in its review of this Rule 60(b)(1) excusable neglect case.

ARGUMENT AND AUTHORITIES

Petitioner argues that the Circuit Court applied the wrong standard in this Rule 60(b)(1) case and secondarily alleges a conflict among the circuits. On the first point, Petitioner argues that the lower courts failed to apply the standards set out in *Pioneer Inv. Services Co. v. Brunswick Associates Ltd. Partnership*, 507 U.S. 380 (1993). Petitioner's attempt fails for three reasons: (1) it incorrectly suggests the lower courts did not consider the *Pioneer* factors; (2) it fails to recognize the critical importance of culpability to the concept of excusable neglect; and (3) it presents as fact what is actually just argument.

A. The *Pioneer* Factors

Contrary to Petitioner's statement at page 8 of her petition, the Circuit Court did not *deem* the *Pioneer* factors inapplicable. Perhaps the reason the Circuit Court did not mention *Pioneer* specifically is because Petitioner did not cite it in her brief there. *See* Petitioner's briefs in Fifth Circuit Cause No. 08-20642.

Pioneer announces that whether neglect is excusable for Rule 60(b)(1) purposes is essentially an

equitable inquiry. 507 U.S. at 395. The Court cites with approval the factors that had been considered by the Sixth Circuit: the danger of prejudice to the debtor; the length of the delay and its potential impact on judicial proceedings; the reason for the delay, including whether it was within the reasonable control of the movant; and whether the movant acted in good faith. 507 U.S. at 395. Petitioner faults the Circuit Court here for supposedly not considering "all" circumstances (she does not say which it did not consider) when it gave special weight to the willfulness of Petitioner's default.

It is unclear whether Petitioner makes a substantive (the court could not consider willfulness since it is not included in *Pioneer's* list) or a procedural (the Circuit Court failed to address the *Pioneer* factors) complaint, but neither has merit.

First, it is unclear whether *Pioneer* applies, at least the part of *Pioneer* Petitioner relies on. Before getting to the *excusable* part of the analysis, *Pioneer* announces that Rule 60(b)(1) requires *neglect*. 507 U.S. at 394, 395. A willful failure is by definition not neglect. *Id.*; *Cacevic v. City of Hazel Park*, 226 F.3d 483 (6th Cir. 2000).

Second, *Pioneer* did not involve any suggestion of a willful failure to answer. The client in *Pioneer* had specifically asked the lawyer about filing deadlines, and the lawyer had inadvertently failed to docket the deadline properly. *Pioneer* therefore involved a negligent failure to answer rather than an intentional

act. Under those specific circumstances, the defendant's failure to timely answer was excused. Neither *Pioneer* nor any other case suggests a *willful* failure would have produced the same result.

More important, the Circuit Court did consider the *Pioneer* factors. One cannot review the Circuit Court's detailed opinion in *Jenkens I* (Pet. App. 11) and conclude otherwise. The only consideration the Circuit Court was not able to resolve in the first appeal was the factor not involved in *Pioneer*: whether Petitioner's failure to file an answer was willful. That was the sole issue on which the Circuit Court remanded the case to the district court, and as shown in more detail below, once that issue was decided, *excusable* neglect did not exist.[4] Significantly, Petitioner made no complaint that the Circuit Court had not followed *Pioneer*[5] in her petition for writ of certiorari from *that* earlier decision (*Jenkens I*).

The Supreme Court in *Pioneer* did make two rulings that do apply to this case:

(1) The court refused to "unsettle any factual findings entered by the bankruptcy court and affirmed by the district court and the court of appeals." 507 U.S. 380, at 397. (*See* p. 12 infra.)

---

[4] Again, assuming *neglect* existed at all.

[5] Petition for Writ of Certiorari No. 08-0842 filed December 23, 2008, denied March 9, 2009.

(2) The court confirmed that a party is bound by the acts of its attorneys, even if prejudicial to the client's interests. 507 U.S. 380, at 396, 397. (Petitioner has been represented by her Cayman counsel, Chapman, throughout this case but particularly at the time of service, avoidance of Hague service, and failure to answer or otherwise respond.)

The three cases cited by Petitioner[6] as supposedly showing a conflict between this decision and *Pioneer* and between the Fifth Circuit and other circuits merely show the not-surprising fact that different facts produce different results in different courts. None suggests that a willful refusal to file an answer can constitute excusable neglect. None supports Petitioner's assertion that the *Pioneer* considerations "go well beyond" whether a *willfully* defaulting party acted with or without good faith. Pet. p. 11. In fact, the authority is to the contrary (*see* 12 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE §§ 60.22, 60.41 (3d ed. 2009)). Even good faith will not salvage a willful failure to file an answer. *Gucci American, Inc. v. Gold Center Jewelry*, 158 F.3d 631 (2d Cir. 1998), *cert. den.*, 525 U.S. 1106 (1999).

---

[6] *Lemoge v. United States*, 587 F.3d 1188 (9th Cir. 2009); *Feeney v. AT&E, Inc.*, 472 F.3d 560 (8th Cir. 2006); *Union Pacific Railroad Co. v. Progress Rail Services Corp.*, 256 F.3d 781 (8th Cir. 2001).

B. Culpable/Willful/Intentional Failure

Petitioner fails to recognize the crucial part culpability, the difference between intentional and unintentional conduct, plays in Rule 60(b)(1) cases. Neither *Pioneer* nor any other case suggests that a party's willful failure to answer will be excused by other equitable considerations.

> "[D]eliberate or willful conduct on the part of the person seeking relief from the judgment precludes, by its very nature, the finding of 'mistake' or 'inadvertence' or 'excusable neglect'."

See 12 MOORE'S FEDERAL PRACTICE, § 60.41[1][c][i]. If intentional or willful, the failure to answer is neither excusable nor neglect.

C. Narrowness of District Court's Analysis

Part B of the petition complains that the district court's analysis was too narrow because it focused on willfulness alone. Pet. p. 14. The "willfulness" finding was the only point on which the case was remanded. *See Jenkens I*, Pet. App. 11. The district court's focus on that point was not an "impermissibly narrow analysis" but exactly what the Circuit Court had required. The Circuit Court had already conducted a thorough analysis of the record with regard to the other *Pioneer* factors in *Jenkens I* and was not required to repeat that process in reviewing the trial court's findings on remand.

D. Conflict Among the Circuits

There is no conflict or split among the circuits regarding the proper standard. In point of fact, the circuits have adopted – with remarkable uniformity – a three-pronged test for evaluating defaults and default judgments under *Pioneer*: (1) prejudice to the non-movant; (2) meritorious defense of movant; and (3) culpability. *See Burrell v. Henderson*, 434 F.3d 826, 832 (6th Cir. 2006); 12 MOORE'S FEDERAL PRACTICE, § 60.22[3][b]. The fact that the courts organize the equitable factors set out in *Pioneer* in a different, more descriptive format does not mean they do not follow *Pioneer*. The third prong of the three-prong analysis (culpability) naturally encompasses the *reason for the delay*, *control of the movant* and *good faith* elements noted in *Pioneer*. There is no conflict among the circuits.

In short, the record shows full compliance with *Pioneer* and its requirement of an equitable analysis of the failure to answer.

E. The Trial Court's Findings

Lastly, Petitioner renews her attack on the trial court's findings themselves. Pet. pp. 15-19. But Petitioner's "facts" are actually just Petitioner's continuing argument concerning them. Some of the facts found by the district court, such as that Petitioner was actually aware of the summons (Pet. p. 17), are virtually compelled by the Circuit Court's finding that the initial service had included the summons *as a*

matter of law. Any other result would allow a party to avoid the effect of summons (to file an answer or make other appearance) with the simple expediency of denying the party was aware of it. Others, such as that Petitioner had instructed her lawyers not to respond to Jenkens but to destroy any communications from them, are shown in the communications from the lawyers themselves. R. 278-279. Without attempting to reargue each finding attacked by Petitioner (Pet. pp. 15-19), suffice it to say all are supported by the record, and the following ones – about which there can be no real dispute – would by themselves support the finding of *willfulness* in Petitioner's failure to answer:

- Petitioner was properly served;
- despite service, Petitioner did not file an answer or otherwise respond;
- Petitioner was served with the Order of Conference and Disclosure of Interested Parties;
- despite such service, Petitioner did not file a certificate of interested parties;
- Petitioner was sent notice of the default hearing;
- Petitioner did not attend the hearing;
- Petitioner refused to communicate with Jenkens in October 2006;

- Petitioner instructed her lawyers not to acknowledge or accept any communications from Jenkens but to destroy them;
- the same lawyers were not allowed to provide Jenkens with contact information for her "new" lawyer.

In short, Petitioner's fact-finding complaints (Pet. pp. 15-19) are contentions, not facts, and are not proper subjects for this Court's review. SUP. CT. R. 10; *Pioneer*, 507 U.S. at 397.

CONCLUSION

Far from seeking adherence to standards set by this Court or clarification of conflicting circuit opinions, Petitioner invites this Court to unfind facts found by the district court and to carve out a special exception for her from Rule 60(b)(1)'s requirement of *excusable* neglect.

Jenkens has no quarrel with the proposition that excusable neglect is an equitable concept and assumes the courts below agree. But the equities here do not favor Petitioner, and the finding of willfulness is supported – virtually compelled – by the record. The Circuit Court correctly found no abuse of the trial court's discretion. The correct standard of review was

applied and there is no split among the circuits. The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

DANIEL V. FLATTEN
PORTER & HEDGES, L.L.P.
1000 Main Street, 36th Floor
Houston, Texas 77002-6336
Telephone: (713) 226-6664
Facsimile: (713) 226-6264
E-mail: dflatten@porterhedges.com

Attorneys for Respondent
Jenkens & Gilchrist,
A Professional Corporation

Supreme Court, U.S.
FILED
FEB 16 2010
OFFICE OF THE CLERK

No. 09-712

In The Supreme Court of the United States

INGRID FELDERHOF,

Petitioner,

v.

JENKENS & GILCHRIST, P.C., et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITIONER'S REPLY TO RESPONDENTS' OPPOSITIONS TO INGRID FELDERHOF'S PETITION FOR WRIT OF CERTIORARI

STEVEN J. KNIGHT
Counsel of Record
RYAN O. CANTRELL
CHAMBERLAIN, HRDLICKA, WHITE, WILLIAMS & MARTIN
1200 Smith Street, Suite 1400
Houston, Texas 77002
Telephone: (713) 658-1818
Facsimile: (713) 658-2553
steven.knight@chamberlainlaw.com

Counsel for Petitioner, Ingrid Felderhof

COCKLE LAW BRIEF PRINTING CO (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Does the Fifth Circuit's Rule 60(b)(1) "excusable neglect" analysis conflict with *Pioneer Investment Services Company, v. Brunswick Associates Limited*, 507 U.S. 380, 113 S.Ct. 1489 (1993), which requires a district court to consider multiple and specific factors?

TABLE OF CONTENTS

Page

Question Presented i

Table of Contents ii

Table of Authorities iii

Argument 1

A. The Fifth Circuit's *Dierschke* standard does not satisfy *Pioneer*'s elements 1

B. The Circuits are not uniform in their application of *Pioneer*; they employ different analyses, which yield inconsistent results 4

C. Respondents mischaracterized the record below 8

Conclusion 11

TABLE OF AUTHORITIES

Page

FEDERAL CASES

Bateman v. U.S. Postal Service, 231 F.3d 1220 (9th Cir. 2000) 2

Briones v. Riviera Hotel & Casino, 116 F.3d 379 (9th Cir. 1997) 5

Cheney v. Anchor Glass Container Corp., 71 F.3d 848 (11th Cir. 1996) 5, 8

CJC Holdings, Inc. v. Wright & Lato, Inc., 979 F.2d 60 (5th Cir. 1992) 8

Feeney v. AT & E, Inc., 472 F.3d 560 (8th Cir. 2006) 6

Gibbons v. U.S., 317 F.3d 852 (8th Cir. 2003) 7

Graphic Communications Int'l Union, Local 12-N v. Quebecor Printing Providence, Inc., 270 F.3d 1 (1st Cir. 2001) 6

Hospital del Maestro v. N.L.R.B., 263 F.3d 173 (1st Cir. 2001) 5

In re Dierschke, 975 F.2d 181 (5th Cir. 1992) 1, 3, 4, 7

In re Guidant Corp. Implantable Defibrillators Products Liability Litigation, 496 F.3d 863 (8th Cir. 2007) 2

In re OCA, Inc., 551 F.3d 359 (5th Cir. 2008) 3, 8

Jenkens & Gilchrist v. Groia & Company, 542 F.3d 114 (5th Cir. 2008) 3, 5, 7, 8

Jennings v. Rivers, 394 F.3d 850 (10th Cir. 2005) 8

TABLE OF AUTHORITIES – Continued

Page

Lemoge v. U.S., 587 F.3d 1188 (9th Cir. 2009).....7

Lowry v. McDonnell Douglas Corp., 211 F.3d 457 (8th Cir. 2000) 5, 6, 7, 8

Nafziger v. McDermott Intern., Inc., 467 F.3d 514 (6th Cir. 2006) 7

Pincay v. Andrews, 389 F.3d 853 (9th Cir. 2004) (en banc) 4, 6

Pioneer Investment Services Company, v. Brunswick Associates Limited, 507 U.S. 380, 113 S.Ct. 1489 (1993) .....*passim*

Raymond v. Ameritech Corp., 442 F.3d 600 (7th Cir. 2006) 3

U.S. v. Brown, 133 F.3d 993 (7th Cir. 1998).....6, 7

Walter v. Blue Cross & Blue Shield United of Wisconsin, 181 F.3d 1198 (11th Cir. 1999).....8

ARGUMENT

The Fifth Circuit's Rule 60(b)(1) excusable neglect standard violates the standard set forth in *Pioneer Investment Services Company v. Brunswick Associates Limited*, 507 U.S. 380, 113 S. Ct. 1489 (1993), which requires a balance of multiple, equitable factors. Relying on pre-*Pioneer* case law, the Fifth Circuit deems the *Pioneer* factors inapplicable, causing a conflict with other circuits. Moreover, the circuits that have accepted the *Pioneer* factors to measure excusable neglect have applied the factors inconsistently. This Court should accept certiorari to create uniformity among the circuits with respect to the application of the *Pioneer* factors under Rule 60(b)(1).

In response to Ms. Felderhof's Petition for Writ of Certiorari, Groia & Co. and Jenkens & Gilchrist, P.C. argue principally that (1) the Fifth Circuit's *Dierschke* test is tantamount to the balancing test set forth in *Pioneer*, (2) the circuits are uniform in their application of *Pioneer*, and (3) Ms. Felderhof is a willful, vexatious litigant who does not deserve the Court's attention. Petitioner responds to these arguments in turn as follows.

A. The Fifth Circuit's *Dierschke* standard does not satisfy *Pioneer*'s elements.

Under *Dierschke*, the Fifth Circuit allows a district court to deny Rule 60(b)(1) relief if there is a

finding of willfulness without consideration of any other factor. This is directly contrary to *Pioneer*'s requirement that *all* equitable factors must be considered. *See* Petition at 8-14. Despite the clear conflict, Jenkens and Groia argue the Fifth Circuit's stop-at-willfulness approach is consistent with *Pioneer*.

Specifically, Respondents argue that a finding of willfulness is actually an independent inquiry that must be satisfied before the *Pioneer* factors come into play. *See* Groia Brief in Opp. at 12-15; Jenkens Brief in Opp. at 14. Their position, however, demands a tortured reading of the Court's decision in *Pioneer*. As stated in *Pioneer*, the Rule 60(b)(1) factors include whether the movant acted in good faith or bad faith. *See Pioneer*, 507 U.S. at 394 (identifying "good faith" as one of many relevant circumstances surrounding a party's omission). Respondents do not explain how "willfulness" differs from *Pioneer*'s inquiry into such facts.

Moreover, the circuits that have adopted *Pioneer* analyze willfulness as an element of the good faith factor in the larger balancing equation. *See, e.g.*, *Bateman v. U.S. Postal Service*, 231 F.3d 1220, 1225 (9th Cir. 2000) ("there is no evidence that he acted with anything less than good faith. His errors resulted from negligence and carelessness, not from deviousness or willfulness."); *In re Guidant Corp. Implantable Defibrillators Products Liability Litigation*, 496 F.3d 863, 867 (8th Cir. 2007) ("In determining whether a party has acted in good faith we have consistently sought to distinguish between contumacious

or intentional delay or disregard for deadlines and procedural rules, and a 'marginal failure' to meet pleading or other deadlines."); *Raymond v. Ameritech Corp.*, 442 F.3d 600, 607 (7th Cir. 2006). The notion that "willfulness" is a threshold inquiry that must be satisfied before *Pioneer*'s equitable factors apply lacks support.

Dierschke, which predates *Pioneer*, is the genesis of the Fifth Circuit's stop-at-willfulness analysis. 975 F.2d 181, 183 (5th Cir. 1992). *Dierschke* does not cite *any* authority for the proposition that the willfulness alone is sufficient to deny relief under Rule 60(b)(1). *Id.* In *Dierschke*, the Fifth Circuit made willfulness talismanic and departed from other circuits which balance all of the equitable factors. *Id.* at 183-84 (acknowledging a variance among circuits, but choosing to apply the willfulness factor in the disjunctive without consideration of the remaining factors). With its recent decisions in *Jenkens*, 542 F.3d at 119-20 and *In re OCA, Inc.*, 551 F.3d at 370, the Fifth Circuit reinforced *Dierschke*'s departure from the majority application.

As discussed in the Petition, *Pioneer* requires a balancing of several equitable factors to be considered in determining excusable neglect, including good faith. The analysis of a litigant's intent behind the failure to timely answer, whether characterized as willfulness or bad faith, is subsumed within the good faith inquiry. The Fifth Circuit's isolation of this factor as a separate, dispositive inquiry is inconsistent with *Pioneer* and the circuits which have adopted it. Petitioner requests this Court accept certiorari and

hold that the Fifth Circuit's *Dierschke* analysis violates the excusable neglect analysis set forth in *Pioneer*.

B. The Circuits are not uniform in their application of *Pioneer*; they employ different analyses, which yield inconsistent results.

Respondents also argue that Ms. Felderhof's petition does not warrant Supreme Court review because there is no confusion among the circuits as to the proper application of the *Pioneer* factors. *See* Groia Brief in Opp. at 16-18; Jenkens Brief in Opp. at 18. Recent circuit caselaw shows otherwise. The Ninth Circuit, sitting *en banc*, recognized:

> Our circuit's confusion is not isolated. The authorities interpreting *Pioneer* in a number of circuits are in some disarray. In fact, the confusion begins with *Pioneer* itself, and various subsequent circuit opinions have cited similar portions of *Pioneer* to support their respective but differing conclusions.

Pincay v. Andrews, 389 F.3d 853, 856-57 (9th Cir. 2004) (*en banc*).

Respondents argue that although the circuit courts sometimes refer to the *Pioneer* factors by different names, they apply the *Pioneer* factors uniformly. Such is not the case, however. For example, compare the following conflicting pronouncements of the *Pioneer* standards:

> "The four *Pioneer* factors do not carry equal weight; *the excuse given for the late filing must have the greatest import.*"

Lowry v. McDonnell Douglas Corp., 211 F.3d 457, 463 (8th Cir. 2000) (emphasis added). *Accord Hospital del Maestro v. N.L.R.B.*, 263 F.3d 173, 175 (1st Cir. 2001).

> "We will ordinarily examine *all of the circumstances involved* rather than holding that any single circumstance in isolation compels a particular result regardless of the other factors."

Briones v. Riviera Hotel & Casino, 116 F.3d 379, 382 n.2 (9th Cir. 1997) (emphasis added).

> "In *Pioneer,* the Supreme Court accorded primary importance to the *absence of prejudice* to the nonmoving party and to the *interest of efficient judicial administration* in determining whether the district court had abused its discretion."[1]

Cheney v. Anchor Glass Container Corp., 71 F.3d 848, 850 (11th Cir. 1996) (emphasis added).

> "If the reason for the delay were the only factor to consider, or even the most important

---

[1] Under this variation of *Pioneer*, it must be emphasized that in *Jenkens I*, the Fifth Circuit held that Jenkens would not be prejudiced by setting aside the default, that Felderhof had meritorious defenses, and that other facts, such as the amount in dispute, will weigh in her favor. App 21-27.

> one, we might agree that the neglect in this case could not be excused. But *Pioneer* makes clear that the standard is a balancing test, meaning that a delay might be excused even where the reasons for the delay are not particularly compelling."

U.S. v. Brown, 133 F.3d 993, 997 (7th Cir. 1998).

As these excerpts reveal, the lower circuits apply the *Pioneer* factors inconsistently, assigning different weights to different factors, sometimes to the exclusion of the remaining factors.[2] Further, some circuits,

---

[2] Notably, the conflicting applications of the "excusable neglect" standard have not only created conflicts among the circuits, but conflicts within circuits *See, e g , Pincay*, 389 F.3d at 856-57 (identifying a series of conflicting decisions within the Ninth Circuit) Consider the following, contradictory excusable neglect analyses conducted by different panels within the Eighth Circuit·

> "Whether the movant had a good reason for delay is a key factor in the analysis, *Lowry v McDonnell Douglas Corp.*, 211 F.3d 457, 463 (8th Cir.2000), but *even without a satisfactory explanation*, relief may be required where other equitable considerations weigh strongly in favor of setting aside the default judgment "

Feeney v AT & E, Inc., 472 F 3d 560, 563 (8th Cir 2006) (citation omitted) (emphasis added).

> "Notwithstanding the relatively flexible *Pioneer* standard, '*there still must be a satisfactory explanation* for the late filing.' *Graphic Communications Int'l Union, Local 12-N v. Quebecor Printing Providence, Inc.*, 270 F.3d 1, 5 (1st Cir. 2001) . . As this court has previously stated, 'at the end of the day, the focus

(Continued on following page)

namely the Fifth Circuit, do not apply *Pioneer* at all. Compare the various recitations of the balancing test discussed above with the following willfulness test employed by the Fifth Circuit:

> "The district court need not consider all of the above factors in ruling on a defendant's 60(b)(1) motion; 'the imperative is that they be regarded simply as a means of identifying circumstances which warrant the finding of 'good cause.' . . . if a district court finds a defendant's default to be willful, 'the district court need not make any other finding.'"

Jenkens & Gilchrist v. Groia & Company, 542 F.3d 114, 119-20 (5th Cir. 2008) (citing *In re Dierschke*, 975 F.2d 181, 183 (5th Cir. 1992)).

In sum, different circuits, and even different panels within the same circuit, apply the *Pioneer* factors differently, or, in the case of the Fifth Circuit, not at all. Some cases within some circuits apply a balancing test where no one factor is dispositive. *See Lemoge v. U.S.*, 587 F.3d 1188, 1192 (9th Cir. 2009) (the district court's failure to consider and balance all *Pioneer* factors was an abuse of discretion); *U.S. v. Brown*, 133 F.3d 993, 997 (7th Cir. 1998); *Nafziger v. McDermott Intern., Inc.*, 467 F.3d 514, 522 (6th Cir. 2006).

> must be upon the nature of the neglect.' *Lowry*, 211 F.3d at 463."

Gibbons v. U.S, 317 F.3d 852, 855 (8th Cir. 2003) (emphasis added).

Other cases give primacy to the good faith element, but nonetheless conduct a balancing of all factors. *See Lowry,* 211 F.3d at 463; *Jennings v. Rivers*, 394 F.3d 850, 856-57 (10th Cir. 2005) (remanding in light of the district court's failure to consider the *Pioneer* factors). Interestingly, although the Eleventh Circuit also balances the *Pioneer* factors, the Eleventh Circuit treats the absence of prejudice as the most important factor. *Cheney v. Anchor Glass Container Corp.*, 71 F.3d 848, 850 (11th Cir. 1996). *Accord Walter v. Blue Cross & Blue Shield United of Wisconsin*, 181 F.3d 1198, 1201 (11th Cir. 1999). The Fifth Circuit, however, has never adopted the *Pioneer* balancing requirement, and, instead, relies on pre-*Pioneer* case-law, which, to the exclusion of other factors, focuses on the narrow issue of good faith. *See Jenkens*, 542 F.3d at 119-20. *See also In re OCA, Inc.*, 551 F.3d 359, 370 (5th Cir. 2008) (citing only the pre-*Pioneer* case, *CJC Holdings, Inc. v. Wright & Lato, Inc.*, 979 F.2d 60, 64 (5th Cir. 1992), for the proposition that a finding of willfulness excuses the balancing analysis).

Petitioner asks the Court to clarify the proper application of the *Pioneer* factors and establish uniformity among the Circuits.

C. Respondents mischaracterized the record below.

Seemingly in an effort to draw the Court away from the divergence in the application of the excusable neglect standard throughout the country,

Respondents dedicate significant portions of their oppositions to addressing specific factual disputes between the parties.[3]

Respondents attempt to paint Ms. Felderhof as a contumacious litigant who willfully evaded the present lawsuit and "disrespectfully snubbed the imprimatur of the entire judiciary." Groia Opp. at 15. Their characterizations are not supported by the record (*See* Petition at 14-20) or simple logic. Ms. Felderhof had nothing to lose by participating in this lawsuit and everything to gain, namely, the return of her residence. Far from the typical defaulting party who engages in gamesmanship to avoid a potential liability in a lawsuit, it was in Ms. Felderhof's best interest to litigate the ownership of her house. As the *Jenkens I* court recognized, "it would be quite strange indeed for Ms. Felderhof to willfully default when

---

[3] For example, Jenkens erroneously accuses Ms. Felderhof of refusing a FedEx delivery and instructing her former law firm not to accept communications from Jenkens. Jenkens' Resp at 5. The FedEx delivery referenced by Jenkens did not have a street address and likely never reached Ms. Felderhof. The instruction to her former law firm was to destroy abusive faxes from her *husband* It had nothing to do with Jenkens and pre-dated the dispute over the Residence by several months. Likewise, Respondents claim Ms. Felderhof willfully refused service under the Hague. *See* Jenkens Opp at 10. Ironically, at the time Jenkens alleges Ms. Felderhof refused service under the Hague (Jan. 31st), the default had been taken, and she was already fighting to get back into the lawsuit Not surprisingly, no court has found she refused any Hague service. These and other unfounded accusations are easily disproven by the record.

doing so would destroy her interest in the home." App. 29-30. In fact, Ms. Felderhof – not Respondents – *initiated* the discussions that gave rise to the interpleader action in September 2006. App. 12-13. She continued to demand the return of her residence in October and November 2006. App. at 29 ("Ms. Felderhof engaged in regular correspondence with Jenkens concerning the dispute over the Williamsburg residence."). Rather than consciously evading the lawsuit, she immediately brought the legal papers to her local Caymanian attorney, who was out of the country at the time. App. 13-14. Having never seen a summons, Ms. Felderhof and her Caymanian attorney, both of whom are foreign citizens, believed the Order for Conference was an instruction for her to appear in the lawsuit, much like a summons. *See* App. 30. And no one could realistically suggest that Ms. Felderhof has not fought tooth-and-nail for two years for the right to participate in this lawsuit and reclaim ownership of her house.[4]

Interestingly, rather than argue the specific findings of willfulness in the district court's order, Respondents argue evidentiary points that were not included in the district court's order. *See* Jenkens

---

[4] Although Jenkens makes much of the forty-four day period between learning of the default and filing petitioner's motion to vacate (Jenkens Opp. at 7, 12), the Fifth Circuit has already considered this argument as well as the controverting evidence and concluded Ms Felderhof acted promptly and diligently in attempting to vacate the judgment. App 26-27.

Brief in Opp. at 19. As pointed out in the Petition, and as tacitly acknowledged by Respondents' failure to defend these findings, the trial court's findings of willfulness are easily disproven by the record. The Fifth Circuit has already considered the same record before the Court and determined, "we do not believe the record conclusively shows that her default was willful." App. at 29.

CONCLUSION

For all of these reasons, Ingrid Felderhof requests this Court to grant her Petition for Writ of Certiorari and reverse the judgment of the Court of Appeals and the District Court. Ms. Felderhof deserves an opportunity to appear in the lawsuit and fight for the return of her residence.

Respectfully submitted,

STEVEN J. KNIGHT
Counsel of Record
RYAN O. CANTRELL
CHAMBERLAIN, HRDLICKA, WHITE, WILLIAMS & MARTIN
1200 Smith Street, Suite 1400
Houston, Texas 77002
Telephone: (713) 658-1818
Facsimile: (713) 658-2553